Supreme Court, U.S.
FILED

No. 94 895 NOV 17 1994

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THE AMERICAN UNION OF BAPTISTS, INC.,
EUGENE F. OSBORNE, SR.,
and
MELVIN B. GLADDING

Petitioners,

v.

THE TRUSTEES OF THE PARTICULAR PRIMITIVE BAPTIST CHURCH AT BLACK ROCK, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

---

PETITION FOR A WRIT OF CERTIORARI

HARRY R. HUGHES
STEVEN M. SCHNEEBAUM*
PATTON BOGGS, L.L.P.
2550 M Street, N.W.
Washington, D.C. 20037
(202)457-6300

Counsel for Petitioners
**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

90 pp

QUESTIONS PRESENTED

1. In concluding that it could not, on First Amendment grounds, adjudicate a dispute between two factions of the board of trustees of a church, whose authority is limited by that organization's constitutive documents and State law to secular affairs, did the Court of Appeals of Maryland interpret the First Amendment's limits on judicial review in a manner consistent with the teachings of this Court?

2. If the answer to Question No. 1 is yes, then is the Maryland Religious Corporations Act, which expressly establishes "the custom and usage of the church" as the statutory criterion for certain corporate actions of church governing bodies, not itself unconstitutional?

3. If the answer to Question No. 1 is no, then have the courts of the State of Maryland, by denying Petitioners judicial review of their claims that they were illegally ousted from the church secular board of trustees, and that subsequent acts of that body were therefore ultra vires and invalid, not deprived Petitioners of property interests without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States?

Table of Contents

Table of Authorities iii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

A. The Primitive Baptist Faith 2

B. The Church at Black Rock 3

C. The Parties 6

D. The Course of Proceedings Below 7

REASONS FOR GRANTING THE WRIT 11

1. The Court of Appeals of Maryland Erred in Its Interpretation and Application of the First Amendment Jurisprudence of This Court 11

   A. The Civil Courts Must Decide Church Property Disputes If They Can Do So Through Application of "Neutral Principles of Law" 12

   B. The Principles Needed to Decide This Case Are Truly "Neutral" 15

2. If the Decision of the Court of Appeals Was Correct, Then the Maryland Religious Corporations Act is Unconstitutional 21

   A. State Laws Injecting the Civil Courts into Doctrinal Matters Are Unconstitutional 21

   B. If the Court Below Was Right, Then the Statute Itself Is Constitutionally Defective 23

3. If the Decision of the Court of Appeals Was Incorrect, Then Petitioners Have Been Deprived of Property Interests Without Due Process 26

A. Petitioners Were Deprived of Property Rights 26

B. Petitioners Did Not Receive Due Process of Law 28

CONCLUSION 29

APPENDIX

Opinion of Court of Appeals 1a

Opinion of Court of Special Appeals 17a

Opinion of Circuit Court for Wicomico County 25a

Report of Arbitrators 28a

Excerpts of Maryland Code 45a

Selected (1978 Restated) Articles of Incorporation 48a

Selected Bylaws 51a

Table of Authorities

Cases:

Air Lift, Ltd. v. Board of County Comm'rs of Worcester County, 278 A.2d 244 (Md. 1971) 27

Barghout v. Mayor and City Council of Baltimore, 833 F.Supp. 540 (D. Md. 1993) 22

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 26, 27

Calvary Presbyterian Church of Baltimore City v. Presbytery of Baltimore of the United Presbyterian Church in the United States, 386 A.2d 357 (Md. Ct. Spec. App. 1978) 27

Carnes v. Smith, 222 S.E.2d 322 (Ga. 1975), cert. den., 429 U.S. 868 (1976) 14, 15

Evans v. Shiloh Baptist Church, 196 Md. 543; 77 A.2d 160 (1950) 19

Everett v. Transaction Development Corporation, 267 A.2d 627 (Del. Ch. 1970) 17

Everson v. Board of Education, 330 U.S. 1 (1946) 21

Gieselmann v. Stegeman, 443 S.W. 2d 127 (Mo. 1969) 17

Grosjean v. American Press Co., 297 U.S. 233 (1936) 27

Hayman v. St. Martin's Evangelical Lutheran Church, 176 A.2d 772 (Md. 1962) 17, 25

Hebert v. Stansbury, 351 So.2d 253 (La. App. 1977), writ denied, 353 So.2d 1355 (La. 1978) 17

Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925) 23

Jones v. Wolf, 443 U.S. 595, 607 (1979) . 9, 10, 12, 13, 14, 15, ... 17

Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94 (1952) 21

Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982) 28

Maryland and Va. Eldership v. Church of God at Sharpsburg, 254 A.2d 162 (Md. 1969), appeal dismissed, 396 U.S. 367 (1970) 10, 13

Maryland and Va. Eldership v. Church of God at Sharpsburg, 241 A.2d 691, 706 (Md. 1968), vacated and remanded, 393 U.S. 528 (1969) 13, 25

Mountain Manor Realty, Inc. v. Buccheri, 461 A.2d 45 (Md. 1983) 17

Murray v. Requardt, 23 A.2d 697 (Md. 1942) 20

Osborne v. The Trustees of the Particular Primitive Baptist Church at Black Rock, Inc., No. 748 (Md. Ct. Spec. App., February 1, 1988) 6

Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969) 12, 13, 15, 17

Ran-Day's County Kosher, Inc. v. State, 608 A.2d 1353 (N.J. 1992), cert. den. sub nom. National Jewish Commission on Law and Public Affairs v. Ran-Day's County Kosher, Inc., ___ U.S. ___, 113 S.Ct. 1366, 122 L.Ed.2d 744 (1993) 22

State ex rel. Dendinger v. Kerr Gravel Co., 104 So. 60 (La. 1925) 19

Valerino v. Little, 490 A.2d 756 (Md. Ct. Spec. App. 1985) 17, 20

Watson v. Jones, 13 Wall. (80 U.S.) 679 (1872) 12, 15

Wharton v. Fidelity-Baltimore Nat'l Bank, 158 A.2d 887, 891 (Md. 1960) 17

Statutes:

Conn. Gen. Stat. Ann. § 33-270 (West 1987) 24

Md. Code, Corps. & Ass'ns §§ 5-306, 5-306(a)(5)(ii) 18, 24

Md. Code, Corps. & Ass'ns §§ 5-307, 5-307(b) 23, 24

Maryland Code, Corps. & Ass'ns §§ 5-310, 5-310(c) 7, 9

Md. Code, Cts. & Jud. Proc. § 3-8A-01 19

Md. Code, Cts. & Jud. Proc. § 3-201 et seq. 8

N.Y. Relig. Corp. Law § 5 24

OtherAuthorities:

J.A. Hardon, The Protestant Churches of America 40 (1959) 3

The American Union of Baptists, Inc., et al., respectfully petition for a writ of certiorari to review the judgment of the Court of Appeals of Maryland in this case.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland, infra, App. 1a-16a, is reported at 335 Md. 579, 644 A.2d 1063 (1994). The opinion of the Court of Special Appeals, infra, App. 17a-24a, is reported at 98 Md. App. 10, 632 A.2d 226 (1993). The opinion of the trial court, the Circuit Court for Wicomico County, infra, App. 25a-27a, is unreported, as is the Report of the Arbitrators, App. 28a-44a, infra.

JURISDICTION

The Court of Appeals entered its judgment on June 28, 1994. A petition for reconsideration was timely filed, and this was denied by the Court of Appeals on August 19, 1994. The mandate of the Court of Appeals was issued on the same day. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Various provisions of the Corporations and Associations Article, Maryland Code, and in particular the Maryland Religious Corporations Act, Md. Code, Corps. & Ass'ns §§ 5-306, 5-307, and 5-310, are set out at 45a-47a in the Appendix, infra.

STATEMENT

This dispute concerns control over the property of a church, the Particular Primitive Baptist Church at Black Rock, in Butler, Baltimore County, Maryland, whose last baptized member died in 1972. Two factions of the Church's governing Board of Trustees both sought the assistance of the civil courts in resolving the dispute. To one of them, Respondents here, the courthouse doors have been open. To the other, Petitioners, they have not. The judicial branch of the State of Maryland has purported to decline to decide the case, on the grounds that to rule otherwise would excessively entangle it in religious controversy, in violation of the First Amendment to the Constitution of the United States. Yet, by refusing to decide, the State judiciary has in fact decided the outcome of the case adversely to Petitioners, and in so doing, Petitioners respectfully submit, it has denied them rights protected according to binding precedents of this Court, and guaranteed to them under the Constitution of the United States.

A. The Primitive Baptist Faith

The Primitive (or Old School) Baptist Faith separated from the parent denomination in the 1820s and 1830s, although it traces its roots back to the Particular Baptists, of Calvinist orientation, established in London 200 years earlier. Its adherents differ from Baptists in other orders and denominations, in that they oppose the dedication of church funds for missionary activities; they reject the notion that theological training is prerequisite to ordination in the clergy; and they strongly insist upon the notion of church as fellowship, meaning that membership in the congregation requires not only baptism, but doctrinal accomplishment and a favorable vote of the other members. Membership is not conferred by church attendance, however long-standing. The communion of Old School Baptists

of the Particular Faith is "closed," meaning that it is offered only to members.

In 1959, it was estimated that there were about 2,000 churches in the United States that could be described as Primitive Baptist (including many orders other than the Particular Faith of which the parties before the Court are members), comprising some 150,000 congregants.[1] The area of greatest geographical concentration of the faith is between Pennsylvania and South Carolina. The Church is not hierarchical, and so while there may be larger congregations responsible for the oversight and well-being of smaller ones, there are not institutions playing legislative or judicial roles for the Church as a whole.

B. The Church at Black Rock

The Particular Primitive Baptist Church at Black Rock was founded in 1828.[2] The first record of a Charter of the Trustees of the Church is dated March 9, 1891. From the very beginning, the secular affairs of the corporation were entrusted to a Board of Trustees, who were however to be subservient in ecclesiastical matters to the duly selected pastor and the membership of the Church.

Elder J.D. Wood, who was to be the last pastor at Black Rock, was installed by the remaining members of the Church in June, 1948. The congregation, never large, did not grow. The last baptized member of the Church, Drucilla Gillispie, died on April 10, 1972. Elder Wood continued to hold services in the Church premises, nearly until his own death in July, 1985.

Under the 1891 Charter, a procedure existed for maintaining the Church in existence, and providing for continuing

---

1 J.A. Hardon, The Protestant Churches of America 40 (1959).

2 The "Black Rock Address," the first articulation of the creed of the Primitive Baptist Faith, was adopted at the Black Rock Meeting House, the predecessor of the Church, in 1832. So there is special historic significance of this Church for believers.

governance, even in the absence of members. This involved subordination of the Church at Black Rock to another church of the same faith and order, which was part of the Baltimore Old School Baptist Association. As far back as 1932, the Church at Black Rock began to draw officers, deacons, and clerks from the nearby Ebenezer Primitive Baptist Church in Baltimore City, a sister member of the Baltimore Association. The Ebenezer congregation was therefore empowered to select the Trustees for Black Rock. Thus the Board of Trustees of the Black Rock Church continued in existence, and was able to see to the secular affairs of the Church -- such as the administration of its real property -- without interruption. In 1977, an action was brought in Baltimore County court by a former Trustee, asking to have this arrangement invalidated, but it was dismissed in April, 1979.

In May of 1978, amended and restated Articles of Incorporation were adopted, under the 1891 Charter and according to the custom and usage of the Faith, by the baptized members of record of all corresponding churches under the authority of the Ebenezer Church and Elder Wood.[3] The 1978 Articles changed a number of provisions of the earlier Charter. They did, however, reiterate expressly the limitation of the power of the Trustees to secular affairs only, with those eligible to decide ecclesiastical matters being individuals baptized and qualified as church members according to the custom and practice of the denomination.

In May 1979, an election of Trustees took place and Bylaws were approved.[4] These actions were pursuant to the restated Articles and were adopted by the remaining members of Ebenezer Church, and by Elder Wood, who was at the time pastor of both churches. Since then, a number of incumbent Trustees

---

[3] Various provisions of the 1978 Articles are set out at 48a-50a in the Appendix, infra.

[4] Selected sections of the Bylaws are provided at 51a-52a in the Appendix, infra.

passed away, with their positions filled by appointment and without controversy. By the end of 1986, the Board had its full complement of ten members,[5] of which a quorum for the conduct of business was stated by the 1978 Articles (Article IV, 2nd paragraph) to be "a majority." Petitioner Eugene F. Osborne, Sr., was President of the Board, with the express authority, inter alia, to convene regular meetings of the Trustees (Bylaws, section 2.1)[6].

The Trustees were seriously divided as to the future of the Church at Black Rock. The dispute took the form of a series of legal measures and countermeasures. In December, 1986, Petitioner Osborne called a meeting of the Trustees to seek the dissolution of the corporation, citing the impracticality of continuing a church without ecclesiastical church members. That effort failed. Mr. Osborne then brought a petition for involuntary dissolution in the Circuit Court of Baltimore County, alleging impropriety in the votes of the Trustees who opposed his measure. The court dismissed the complaint on May 14, 1987 (Case No. 28/150/87CSP233), and the Court of Special Appeals affirmed on February 1, 1988 (No. 748).[7]

Interestingly, the Court of Special Appeals noted the careful distinction in the 1978 Articles between the authority of the Trustees over secular matters and that of the congregation in things religious, and held that, since the Articles provided for the continuation of the Trustees, the lack of members, even if it could be proved, would not mandate the winding-up of the corporation. It could not, the court noted however, be judicially determined

---

[5] None of the Trustees, of course, was a member of Black Rock Church, but membership was not required by the 1978 restated Articles, or by the 1891 Charter.

[6] Special meetings could be convened by three of the four members of the Executive Committee. Bylaws, section 3.

[7] Both of these judicial decisions are unreported.

whether there were or were not persons entitled to call themselves members of the Black Rock congregation. That issue "is inextricably intertwined with a determination of whether the persons who worship at the Church adhere to the tenets of a certain religious faith and therefore qualify as members of that church." Osborne v. The Trustees of the Particular Primitive Baptist Church at Black Rock, Inc., No. 748 (Md. Ct. Spec. App., February 1, 1988).

Meanwhile, in May, 1987, without the assent or involvement of the President, two of the trustees (the Vice President and Secretary of the Board) issued to all ten trustees a written notice purporting to call a "special meeting" of the Board, for the announced purpose of "electing officers." That meeting, attended only by the five members who convoked it and non-Trustee guests of theirs, therefore took place on June 13, 1987, without a quorum. Nevertheless, those in attendance, purporting to act in the name of the Board of Trustees, "removed" the two Petitioner Trustees and one other,[3] filled the "vacancies" thus created with persons of their own selection, elected "officers," and took various actions allegedly on behalf and in the name of the Church. They continue to claim the right to own and to dispose of Church property, deriving from their actions at the June 13 meeting, and have made repeated demands that Petitioners hand over to them the property in their custody. Petitioners refuse to comply.

C. The Parties

Petitioner The American Union of Baptists, Inc. ("AUB"), a non-profit corporation, was incorporated by Petitioner Eugene F. Osborne, Sr. on May 25, 1987, in the State of Maryland. Its

---

[3] The five Trustees purported to declare that the terms of Petitioner Melvin B. Gladding and of Trustee Virginia Gladding had ended (even though all 10 Trustees had been elected at the same time), and that Petitioner Osborne was removed from the Board "for cause" -- apparently for having refused to convene a meeting. Even the full Board would not have had authority to take these actions.

purpose was and is the maintenance of Primitive Baptist Churches and their congregations. Among other activities, it has acquired legal title to extinct churches, with the intention of salvaging or selling their property where appropriate, and dedicating the proceeds to the upkeep of churches of the same Faith that need infusions of capital to remain in operation.

The Ebenezer Church, itself with greatly reduced membership and no pastor, was merged into AUB on July 23, 1987, together with all of its assets. The Black Rock Church, acting "according to the custom and usage of the church" (and thus in conformity with Maryland law), under the authority of Ebenezer, was merged into AUB on April 16, 1988. Those with the authority to vote for Trustees did so, and the new, properly constituted Trustees approved the merger, which was duly recorded by the appropriate Maryland State agency on May 18, 1988.

The individual Petitioners, two of the surviving true Trustees of the Church at Black Rock as of June 13, 1987,[9] as well as the organization into which the Church was subsequently merged according to the custom and usage of the Primitive Baptist denomination, contest the validity and the results of the so-called meeting of the Trustees convened by George Welden on June 13, 1987. Respondents, representing the five Black Rock Trustees who met and purportedly took action in the capacity of the Board on that date, do not recognize any of the acts of Petitioners thereafter as being of legal effect.

D. The Course of Proceedings Below

As provided by Maryland Code, Corps. & Ass'ns § 5-310, Petitioner Osborne contested the results of the illegal and ultra vires meeting of June 13, 1987, by initiating a demand for arbitration, under the Uniform Arbitration Act, Md. Code, Courts

---

[9] Of the five Trustees not involved in the June 13 meeting, two are Petitioners here, one (John B. Ensor) is deceased, and two (Lucille Akers and Virginia Gladding) are unable to pursue this matter further.

and Judicial Proceedings Article § 3-201 et seq. The notice was filed on February 4, 1988, and after some difficulty in arriving at a third, neutral arbitrator, the proceeding went forward. The arbitrators were: Victor H. Laws, Esq., selected by Petitioners, Mr. Bryan L. Shockley, selected by Respondents, and retired Judge Marvin H. Smith, selected by the Circuit Court for Wicomico County. The arbitrators' report, Mr. Laws dissenting, was issued on October 5, 1991.

Essentially, the arbitrators validated the convocation, procedure, and results of the June 13 Trustees meeting. They expressly noted that five persons (George Welden, Russell Welden, Gail Thompson, Luwanda Viers, and Carl Viers[10]) attended, out of the ten then in office, and concluded that "this was a majority of the board." Report of Arbitrators, pp. 10-11; see App. 35a-36a, infra. They found that the Vice-President, George Welden, was empowered to call the June 13 meeting despite the exclusive authority conferred upon the President, because the latter "had declined to do his bounden duty [sic] . . . of calling such meeting" (although it did not specify the origin of this "duty"). The panel opined that "had the other trustees sought a writ of mandamus to compel him to call the meeting, a court of competent jurisdiction would have issued such an order." Id., p. 17; see App. 43a, infra.

There is no dispute, and has never been, that only five of ten Trustees attended the June 13 meeting, that Petitioner Osborne had refused to call the meeting, and that the Trustees who took it upon themselves to claim the President's authority to convene it did not first (or, for that matter, ever) seek a writ of mandamus from a court of competent jurisdiction to compel him to do so. There is similarly no doubt that the moderator of the meeting was not a Trustee, as required by the 1987 Articles; that the Trustees do not have the authority to create a vacancy on the Board; that

---

[10] Petitioners readily concede that each of these five individuals was a Trustee of the Black Rock Church on the day of the meeting.

Trustees have no power to elect new Trustees (although they may designate persons to fill the unexpired terms of incumbent Trustees); and that the actual purpose of the meeting (the decimation and stacking of the Board) was not the purpose stated by George Welden in his written notice of the June 13 meeting (which was "to elect officers").

Petitioners appealed from the Arbitrators' report to the Circuit Court for Wicomico County. On cross-motions for summary judgment, the Circuit Court, Alfred T. Truitt, Jr., J., rejected the challenge and affirmed the award. See App. 25a-27a, infra.

The Court of Special Appeals affirmed, 632 A.2d 226 (Md. Ct. Spec. App. 1993), but for a very different reason. It held, as a matter of law, that Maryland Code, Corps. & Ass'ns § 5-310, by providing, in cases subject to mandatory arbitration, that "[t]he judgment or award of the arbitrators, signed or acknowledged by them, is final," precludes judicial review of the arbitrators' action altogether, unless it was "completely irrational."[11] Md. Code, Corps. & Ass'ns § 5-310(c) (emphasis added); 632 A.2d at 228.

On discretionary review, the Court of Appeals utterly rejected that argument, rebuffing the notion that, in enacting § 5-310, "the legislature intended . . . to prohibit courts from exercising jurisdiction over such secular matters" as "allegations of voter fraud, ballot-box stuffing, incorrectly printed ballots, or other misdeeds that are quite secular in nature."[12] 644 A.2d 1063, 1067 (Md. 1994) (citations omitted). Thus the arbitrators'

---

[11] Since the arbitrators here concluded that five is a majority -- that is, more than half the total, see Merriam Webster's Collegiate Dictionary 702 (10th ed. 1993) -- of 10, a solid argument can be mounted that their decision was literally irrational.

[12] While the Maryland Court of Appeals omitted from its examples of "secular misdeeds" false claims that a quorum is present, this Court expressly included it. See Jones v. Wolf, 443 U.S. 595, 607 (1979). Jones v. Wolf is discussed in more detail at pp. 12-15, infra.

decision was subject to judicial review. Yet Maryland's highest court then went on to conclude, even so, that this case involved doctrinal and ecclesiastical matters, and thus lay beyond the boundary separating church from state in our society.

The court paid homage to the rule that "neutral principles of law" may be constitutionally applied to religious organizations. This proposition, often reiterated by this Court (as, for example, in Jones v. Wolf), is also incontrovertibly the law of Maryland. See, e.g., Maryland and Va. Eldership v. Church of God at Sharpsburg, 254 A.2d 162 (Md. 1969), appeal dismissed, 396 U.S. 367 (1970). Nor did Petitioners seek to have the court overrule any part of Sharpsburg; they simply asked the court to apply the same scrutiny to the corporate actions of the Board of Black Rock Church that it would routinely have exercised in assessing the legality of acts of any other corporate body.

Yet after pages of establishing a legal premise not in issue, the Court of Appeals failed to apply the requisite "neutral principles of law." It utterly ignored the fact that no quorum was present at the critical meeting. It made no mention of the failure of the meeting to comply with binding rules of corporate governance: rules that have nothing to do with anything remotely doctrinal, ecclesiastical, or sectarian in nature.

Instead, the court erroneously characterized as "the crux of AUB's argument" the claim that "Osborne, then President of the Trustees, was under no obligation to call a meeting of the Trustees because the church no longer existed." 644 A.2d at 1069. It therefore inferred as the "root question . . . whether the Particular Primitive Baptist Church at Black Rock was 'extinct' in 1987." And it concluded that the resolution of that question would require evaluation of comparative claims to religious orthodoxy, which are obviously outside the proper and constitutional purview of civil courts in this country. "[I]n order to decide this matter," wrote the Court of Appeals, "we would be required to resolve the property disposition based on our

interpretation of religious custom and polity. This we cannot do." Id. at 1070.

It is not, then, that the Court of Appeals assessed Petitioners' arguments on the merits of the underlying dispute and found them wanting. It is not that Petitioners were rebuffed in their constitutional theories, or even in their contentions on the proper way to apply or to interpret Maryland law. Petitioners were denied review because, in the opinion of the Court of Appeals of Maryland, adjudication of their case required the courts to venture too close to that zone off-limits to public institutions, the "thicket" of doctrinal disputes. Id. at 1068.

The courts cannot and should not determine what is correct and what is incorrect adherence to the doctrines of a religious persuasion. All of those principles are axiomatic. Petitioners did not urge the rejection of those principles below and do not contest them here: they have no bearing on the proper resolution of this case.

The Maryland courts here stated that they decline to resolve a controversy entirely secular in nature. By so doing, they upheld the rights of one set of claimants, and rejected those of another. If they were right to do so, then the statute under which Petitioners came to court must itself be constitutionally defective. If they were wrong, however, then these Petitioners have been deprived, by a grossly erroneous invocation of constitutional principle, of the most fundamental right to due process of law. In either event, the decision of the Court of Appeals of Maryland should be reviewed and reversed.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals of Maryland Erred in Its Interpretation and Application of the First Amendment Jurisprudence of This Court

A. The Civil Courts Must Decide Church Property Disputes If They Can Do So Through Application of "Neutral Principles of Law"

This Court has long held that it is "wholly inconsistent with the American concept of the relationship between church and state to permit civil courts to determine ecclesiastical questions." Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 445-46 (1969), citing Watson v. Jones, 13 Wall. (80 U.S.) 679 (1872). On the other hand, the courts may not refrain from deciding an otherwise justiciable dispute merely because one party or the other is a religious institution, or because adjudication would require the court to review and interpret a religious document (such as a church constitution). Jones v. Wolf, 443 U.S. 595, 604 (1979). The issue presented is one of balance: the weighing of the litigants' and the civil society's right to have disputes resolved in a peaceful and orderly manner by the courts of law, with the constitutional stricture that the courts avoid excessive entanglement in, or establishment of, religion.

The Court's approval in Jones v. Wolf of the application of "neutral principles of law" to resolve church property disputes provides a methodology for balancing these various interests. In Jones, two factions of a congregation affiliated with the Presbyterian Church in the United States ("PCUS"), a national hierarchical church organization, disagreed as to the proper ownership of certain local church property. The majority of members of the local church had voted to separate from the PCUS and to join another denomination. A higher church court within the PCUS appointed a commission, which declared the minority faction of the local church to be the "true congregation," therefore entitled to ownership of the assets. The minority faction filed a class action suit in Georgia seeking declaratory relief. The State courts found for the majority, on the grounds that they could

unravel the property dispute without excessive entanglement in the underlying disagreement over religious doctrine, by applying "neutral principles of law." The minority faction appealed to this Court.

This Court approved the Georgia courts' reliance upon neutral principles of law, holding that "[t]he State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively." Jones v. Wolf, 443 U.S. at 602 (citing Presbyterian Church, 393 U.S. at 445). At the same time, the Court recognized that the First Amendment "severely circumscribes" the role that civil courts can play in resolving church property disputes, and that it prohibits the rendering of judicial decisions "on the basis of religious doctrine and practice." Id. at 602 (citations omitted). If State law assigns responsibility for deciding church property disputes to ecclesiastical authorities, which are charged by church custom with the "resolution of issues of religious doctrine or polity," the civil authorities must defer to them. "Subject to these limitations, . . . 'a State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.' Maryland and Va. Churches v. Church of God at Sharpsburg, 396 U.S. 367, 368 (1970) (Brennan, J., concurring) (emphasis in original)." Jones v. Wolf, 443 U.S. at 602.

Georgia's neutral-principles approach relied exclusively on objective, well-established tenets of property law with nothing to do with religion. It thereby "free[d] civil courts completely from entanglement in questions of religious doctrine, polity, and practice." Id. at 603. The neutral-principles approach strikes a balance which "is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity." Id. at 603. That is, it maximizes the opportunities for

courts to decide civil cases properly before them, while protecting them from running afoul of First Amendment strictures.

The Court in Jones v. Wolf provided indications of the kind of neutral principles that the civil courts may apply to adjudicate disputes involving religious organizations. It is open to a State to provide in legislation for the presumption that the affairs of religious bodies are entrusted to the majority of members, assuming that the definition of membership is not itself a matter of interpreting doctrine. Where there are competing claims to represent the church, "the majority faction generally can be identified without resolving any question of religious doctrine or polity." Id. at 607. Jones v. Wolf itself, had the presumptive rule of majority representation applied, would have presented no problem for the courts, since there was no dispute "about the identity of the duly enrolled members of the Vineville church when the dispute arose, or about the fact that a quorum was present, or about the final vote" at the meeting to sever the local church's ties with the national denomination. Id. at 608 (emphasis added).

These are the Court's examples of the kinds of matters that can be judicially resolved on the basis of neutral principles of law, without having to enter the forbidden territory of religious doctrine. If, at the Vineville church meeting considered in Jones v. Wolf, the tellers of the vote counted inaccurately, or had the moderator of the meeting incorrectly determined that a quorum was present, the courts could have -- indeed, they would have been obligated to -- set aside the "majority" decision.

In Jones v. Wolf, the State courts had not definitively determined whether the presumption of majority rule applied or not. An argument had been made that under Georgia law, "church property [was] to be held according to the terms of church government," under which a local member of a hierarchy is "subject to the higher authority of the organization and its laws and regulations." Id., at 608, citing Carnes v. Smith, 222 S.E.2d

322, 328 (Ga. 1975), cert. den., 429 U.S. 868 (1976). The First Amendment not only permits but requires State courts to give deference to the findings of the church hierarchy, such as that of the PCUS, when there is one. In Jones v. Wolf, the Court vacated the decision of the Georgia Supreme Court for failure to articulate how it had done this, and remanded the case for further proceedings.

But the elucidation in Jones v. Wolf of the neutral principles of law that may -- that must -- be applied in resolving civil disputes that happen to involve churches remains, and has never been questioned or revisited by the Supreme Court. "It is obvious . . . that not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property." Presbyterian Church, 393 U.S. at 449. Where neutral principles can be applied, the courts must apply them And it is hard to imagine a principle more "neutral" than the one needed to apply this syllogism: (a) A board has ten members, and the required quorum is "a majority." (b) Five members decide to get together and purport to act for the board. (c) There is no quorum; ergo, the actions purportedly taken on behalf of the board are invalid.

B. The Principles Needed to Decide This Case Are Truly "Neutral"

The Maryland Court of Appeals, while acknowledging this Court's opinion in Jones v. Wolf, concluded that it could not resolve the issues before it in this case without impermissibly delving into matters of religious belief. In so doing, it seriously misunderstood what it was called upon to decide, and misapplied the neutral principles doctrine as articulated by this Court in cases at least since Watson v. Jones in 1872.

As noted, Petitioners contest the propriety of the meeting attended by five of the ten members of the Board of Trustees on June 13, 1987. Their principal objections are the following:

> a) The meeting lacked a quorum, since a quorum of the Board was six, not five, a "majority" of the ten-member body. 1978 Articles, Article IV, 2nd paragraph.
>
> b) The meeting was called by someone other than the President, although only he had authority to call meetings.[13] Bylaws, section 2.1.
>
> c) The meeting was presided over by someone not a Trustee, although only Trustees were authorized to preside. 1978 Articles, Article IV, 2nd paragraph.
>
> d) The five Trustees purported to remove Trustees, in the absence of authority (even of the full Board) to do so. The 1978 Articles, Article III, provides for removal of trustees only "pursuant to or by operation of law."
>
> e) The five Trustees purported to name new Trustees, although the power to select Trustees belonged to the Members of the Church. 1978 Articles, Article III.

---

[13] Special meetings could also be convened by three of the four members of the Executive Committee. See footnote 6, supra.

f) The actions taken at the meeting differed substantially from the purpose "to elect officers" announced in the notice of special meeting, contrary to section 5 of the Bylaws.

The issues that must be considered by a court in assessing these claims in no way involve "religious doctrine and practice," as forbidden by this Court in Jones v. Wolf. They implicate no "ecclesiastical questions," which are outside the courts' competence under Presbyterian Church. They are perfectly standard, garden-variety questions of corporate law, such as are addressed every day in courthouses around the United States.[14] Yet the Court of Appeals of Maryland considered that the dispute was of quite a different character. The court found the crux of Petitioners' arguments to be

---

[14] See, e.g., Gieselmann v. Stegeman, 443 S.W. 2d 127, 136 (Mo. 1969) ("so-called meeting of the board of directors . . . was illegal" where no notice of the meeting was given and no quorum was present); Mountain Manor Realty, Inc. v. Buccheri, 461 A.2d 45 (Md. 1983) (holding that remaining sole director where two other corporate directors resigned could fill vacancies as the "majority of the remaining directors" notwithstanding the lack of a quorum); Hebert v. Stansbury, 351 So.2d 253 (La. App. 1977) (where articles of incorporation gave president authority to call meeting of board of directors, meeting called by secretary was not valid meeting and purported election of officers at that meeting invalid), writ denied, 353 So.2d 1355 (La. 1978); Wharton v. Fidelity-Baltimore Nat'l Bank, 158 A.2d 887, 891 (Md. 1960) ("Ordinarily, a director is not subject to dismissal by the board or by any officer thereof . . . . He can be removed only through action by the stockholders."); Everett v. Transaction Development Corporation, 267 A.2d 627 (Del. Ch. 1970) (held plaintiff properly removed as director by stockholder where removal was in accordance with bylaw that was approved by directors, including plaintiff, so that plaintiff had no vested right in office); Hayman v. St. Martin's Evangelical Lutheran Church, 176 A.2d 772 (Md. 1962) (in suit by minority faction to determine right to church property, court explained that a "congregation" is "all the persons entitled to vote at the meetings of the Church," confirming that, pursuant to state law, "the corporation is managed by the trustees elected by the congregation."); Valerino v. Little, 490 A.2d 756 (Md. Ct. Spec. App. 1985) (notice of a special board of directors meeting was held invalid where the bylaws required all directors be sent notice stating the purpose of the meeting and the notice sent was insufficient to advise director that stock may be issued).

that, because the bylaws vest the power to call meetings solely in the president of the Trustees, the June 1987 special meeting was invalid and all actions taken there are void. At the same time, however, AUB claims that Osborne, then President of the Trustees, was under no obligation to call a meeting of the Trustees because the church no longer existed. It is clear to us that the outcome of this dispute hinges on whether, at the time of its June, 1987, special meeting, the Welden group [i.e., the five Trustees who called and attended the meeting] possessed the power granted to trustees by § 5-306 of the Corporations and Associations Article to act on behalf of the church. This, in turn, depends on whether Osborne, as president of the Trustees, failed in his duties as president by declining to call an annual meeting, thus allowing Welden, as vice president, to "assume the duties of the president" as permitted by the bylaws. If the church was extinct, then Osborne clearly had no continuing duty to call such meetings. If the church was not extinct, however, then Welden may well have possessed the power to call the meeting. The root question, then, is whether the

> Particular Primitive Baptist Church at Black Rock was "extinct" in 1987.
>
> * * *
>
> It is well settled in this State that the determination of a membership in a church is a question well embedded in the "theological thicket" and one that will not be entertained by the civil courts. Evans v. Shiloh Baptist Church, 196 Md. 543, 551; 77 A.2d 160, 163 (1950).

644 A.2d 1063, 1069 (emphasis added). Thus the Maryland court addressed one of the six alleged irregularities of the June 13, 1987 meeting (point (b) above). It did so incorrectly. As to the other five, including the rather clear matter of the lack of a quorum, the court was utterly silent.

Whether Eugene F. Osborne, Sr., was "under an obligation" to call an annual meeting of the Black Rock Trustees in June 1987 is most emphatically not the point on which this dispute "hinges." That is the answer to a question that the Welden group never asked. Had Respondents felt that Petitioner Osborne was acting in violation of what the arbitrators called "his bounden duty," Report of Arbitrators, p. 17; see App. 43a, infra, they had a legal remedy. They could have sought a writ of mandamus to compel him to convene the meeting or to step aside. See Md. Code, Cts. & Jud. Proc. § 3-8A-01. See, e.g., State ex rel. Dendinger v. Kerr Gravel Co., 104 So. 60 (La. 1925) (writ of mandamus granted compelling president to call meetings of board of directors and stockholders).

But they did not do that. There is no legal provision, in the Maryland Code or elsewhere, for "self help" in such

circumstances. In a mandamus hearing, Osborne could well have argued that the Church was extinct, and that he was therefore freed of the obligation assigned to him by the 1978 Articles and the Bylaws. The court would have had to decide whether to listen to that argument, or whether to exclude it for First Amendment reasons. Or perhaps Petitioner Osborne would have put forward some other reason why, in his contention, he was not legally required to convene the Trustees. He had, however, the right to make those arguments, and Respondents were under an obligation not to take the law into their own hands, in flagrant violation of the articles of incorporation of the very body on whose behalf they were purporting to act.

The secular character of the five issues totally ignored by the Maryland Court of Appeals is, if anything, even clearer. Who presided over the meeting is an issue of fact not in dispute. Whether five is a "majority" of ten requires reaching for a dictionary, not the Bible. There is simply no basis, even if the meeting had been properly called and a quorum had been present, for the arrogation by any number of Trustees of the capacity to "remove" their colleagues, or to appoint new Trustees. The latter was a power expressly reserved to the ecclesiastical body: the members of the church, or those entitled, under the customs and usages of the church, to act in their stead. A court can determine whether an action by the board is ultra vires. See, e.g., Murray v. Requardt, 23 A.2d 697, 699-700 (Md. 1942) ("It has been held in this court, as in most courts, that we cannot pass upon or interfere with the internal management of a corporation, unless, of course, its corporate acts are fraudulent, illegal or ultra vires."). And it is perfectly easy to compare a meeting announcement with the resulting minutes to decide whether they are similar. See, e.g., Valerino v. Little, 490 A.2d 756 (Md. Ct. Spec. App. 1985) (notice of a board of directors meeting held invalid, thus invalidating actions taken at meeting, where notice insufficiently stated purpose of meeting).

None of these points would involve the judiciary in addressing questions in the slightest bit sectarian or doctrinal. All of them are purely secular in character, and resolving them would require nothing more than the routine application of neutral principles of law. In declining to review the facially erroneous report of the arbitrators on these points, the Court of Appeals of Maryland erred in its interpretation of the First Amendment, and in its reading of the opinions of this Court. For these reasons, that court's decision should be reviewed and reversed, and this matter should be remanded with directions that it be considered by the State courts on the merits.

2. If the Decision of the Court of Appeals Was Correct, Then the Maryland Religious Corporations Act is Unconstitutional

A. State Laws Injecting the Civil Courts into Doctrinal Matters Are Unconstitutional

Not only the necessity to avoid excessive entanglement with or establishment of religion, but also the fundamental right of Americans to the free exercise of religion itself, requires that State authorities not impose secular, civil law upon matters sectarian in nature. Thus while the legislature of a State may surely provide rules to govern the ownership of church property, or the employment of clergy, it may not in so doing create laws the interpretation of which will require the courts to usurp religious functions. The State is simply not to be in the business of deciding what is doctrinally proper under the rules of a church organization.

Thus in Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94 (1952), this Court struck down as contrary to the First Amendment[15] a New York law that provided

[15] The First Amendment is made applicable to the States by the Fourteenth Amendment. See Everson v. Board of Education, 330 U.S. 1, 14-16 (1946) (discussing application of the "establishment of religion clause" to the States through the Fourteenth Amendment).

for the use of property by the Russian Orthodox Church in North America. At issue was recognition of the selection of the ruling archbishop. The Court held that while there may be many areas in which the legislature may require compliance by religious corporations, or where the activities of such entities may be regulated, the law may not "intrude[] for the benefit of one segment of a church the power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment." Id. at 119. The State may not interfere in a matter so central to religious practice as the appointment of a presiding hierarch. To the extent it purports to do so in its enacted legislation, those instruments are inconsistent with the Constitution of the United States, and will be declared invalid.

Nor may agencies or courts be constitutionally required to interpret religious dogma. Thus the Supreme Court of New Jersey recently invalidated regulations on labelling of kosher food. Ran-Dav's County Kosher, Inc. v. State, 608 A.2d 1353 (N.J. 1992), cert. den. sub nom. National Jewish Commission on Law and Public Affairs v. Ran-Dav's County Kosher, Inc., ___ U.S. ___, 113 S.Ct. 1366, 122 L.Ed.2d 744 (1993). The term "kosher," if used in a State regulation binding upon citizens, cannot be defined as "prepared and maintained in strict compliance with the laws and customs of the Orthodox Jewish religion," 608 A.2d at 1357 (emphasis added), unless the courts of the State are able to say authoritatively what the underlined term means. In the event of a dispute about how to interpret this language -- possibly with the application of sanctions hanging in the balance -- the State "invariably would be one of the disputants, seeking to impose and enforce its own interpretation of Orthodox Jewish doctrine, and adjudication by a court of such disputes inevitably would entail the application and interpretation of Jewish law." 608 A.2d at 1364. See also Barghout v. Mayor and City Council of Baltimore, 833 F.Supp. 540 (D. Md. 1993).

A contrary conclusion is not mandated by this Court's holding in Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925). The standards for measuring violations of the establishment and free exercise clauses have evolved considerably in the last seven decades, and it is unlikely that the laws at issue there, which were challenged not under the First Amendment but on due process and equal protection grounds, would survive scrutiny on that standard today.

If, then, the Maryland Religious Corporations Act inevitably confronts courts with becoming embroiled in constitutionally forbidden doctrinal matters every time a dispute over church property is brought before them, then the statute is itself unconstitutional. If the mere inclusion of reference to "the custom and usage of the church" as guiding the succession of trustees, in Md. Code, Corps. & Ass'ns § 5-307(b), is sufficient to make adjudication of disputes impossible -- as the Maryland Court of Appeals appears to have concluded[16] -- then the constitutional infirmity is not in the court's interpretation. It is in the statute being interpreted, which should therefore be struck down.

B. If the Court Below Was Right, Then the Statute Itself Is Constitutionally Defective

It is not unusual for States to defer by statute to the customs and usages of religious organizations, especially hierarchical ones which often include quasi-judicial bodies in their decision-making or review process. As noted above, statutory provisions of this kind are ordinarily respected, and indeed the courts are required to defer to the religious organization if the alternative is excessive entanglement in doctrinal matters.

---

[16] 644 A.2d at 1070 ("[I]n order to decide this matter, we would be required to resolve the property disposition based on our interpretation of religious custom and polity.").

The issue here, however, is a very particular one. The Maryland Court of Appeals in its opinion referred specifically to a provision of the Religious Corporations Act regarding the authority of church trustees, Md. Code, Corps. & Ass'ns § 5-306. That provision makes no reference at all to religious concepts, being merely a delineation of the powers that trustees may be assigned by the articles of a religious corporation.[17] The "custom and usage" language appears only in Md. Code, Corps. & Ass'ns § 5-307(b), concerning successor trustees, which reads as follows:

> Unless the plan provides otherwise, the trustees shall be elected and their successors continued at the time and place ordinarily used for public meetings of the church, by the individuals who, according to the custom and usage of the church, have a voice in the management and direction of congregational or temporal affairs.

The research of undersigned counsel reveals only two other States, New York and Connecticut, that have statutes regarding succession to the board or the powers of trustees that are similarly phrased. See Conn. Gen. Stat. Ann. § 33-270 (West 1987); N.Y. Relig. Corp. Law § 5.

The Maryland Court of Appeals wrote, 644 A.2d at 1068, that in two earlier cases, "we determined that Maryland's Religious Corporation Law was a 'neutral principle of law.'" But surely that is inconsistent on its face with the determination that the court was unable to decide this case, which concerned the corporate activities of a church governing body acting entirely

---

[17] One of these powers is to "[d]etermin[e] the number of members necessary to constitute a quorum." Md. Code, Corps. & Assn's § 5-306(a)(5)(ii). It was under that authority that the Black Rock Trustees' quorum was required to be "a majority" of the membership of the Board of Trustees.

within the cited Maryland statute. If the entire statute were a "neutral principle," then it would have to follow that the two provisions concerning the powers of trustees and succession to those powers are neutral. Yet it is those very provisions that require interpretation of "the custom and usage of the church," in order for a reviewing court to be able to assess the validity of purported action by a church governing body. And it is those very provisions that the courts of Maryland refused to apply here, holding that they were unable to determine who had succeeded to the power to act for the Trustees of the Church at Black Rock.

If the court of appeals was right, then the statutory law of Maryland requires the courts to do what the Constitution prohibits them from doing: to examine enough of the custom and practice of a church to know whether the individuals claiming to act as trustees really have the authority to do so. If the court of appeals was right, then the Maryland legislature has created a system that is ab initio unenforceable, and actions of which will be in principle unreviewable. That the Maryland courts have occasionally in fact applied the Religious Corporations Act to situations involving church property disputes -- for example in Hayman v. St. Martin's Evangelical Lutheran Church, 176 A.2d 772 (Md. 1962) -- cannot change that conclusion. In this case, assertedly relying on the Religious Corporations Act, the court of appeals in essence held that any look into the customs and usages of the church was too much.

The same court wrote of a church property dispute in 1968: "Either the majority or the minority must be held to control the local church property, and the equity court must make the decision, so that the property rights are lawfully established by judicial process rather than by possible self-help." Maryland and Va. Eldership v. Church of God at Sharpsburg, 241 A.2d 691, 706 (Md. 1968), vacated and remanded, 393 U.S. 528 (1969). Petitioners respectfully submit that the court was correct in that opinion. Respondents resorted to self-help to acquire certain

rights and property. They acted in direct violation of the corporate governing documents of the Black Rock Church. The courts of Maryland were compelled to adjudge which faction was right: applying neutral principles, was the conduct of the June, 1987, meeting in compliance with requirements of the Religious Corporations Act, and corporate procedures established pursuant to it? Only in that manner can they have satisfied their obligation to decide who is lawfully entitled to control the property of the Particular Primitive Baptist Church at Black Rock.

The courts of Maryland held that they could not do this, because they would be led into the thicket of unconstitutionality by the Religious Corporations Act itself. If this logic is correct, then the Act must be unconstitutional, and it should be struck down as such by this Court.

3. If the Decision of the Court of Appeals Was Incorrect, Then Petitioners Have Been Deprived of Property Interests Without Due Process.

A. Petitioners Were Deprived of Property Rights

Under the Fourteenth Amendment, no State may "deprive any person of life, liberty, or property without due process of law." This Court laid down in Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) that property interests "protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." 408 U.S. at 571-72 (footnote omitted). Nor is there a definitive, exhaustive list of property rights deserving of protection. Rather, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as State law, rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Id. at 577.

Petitioners here had property interests of two types. First, the American Union of Baptists, Inc., was the legitimate assignee

of the assets of the Church at Black Rock, through a devolution in accordance with the "custom and usage" of the Church. It therefore had the right to ownership of those assets, although its right to dispose of them was limited by the terms of its own corporate charter. Ownership is surely a property interest rooted in State law.[18] And a corporation is a "person" within the meaning of the due process clause. Grosjean v. American Press Co., 297 U.S. 233, 244 (1936).

AUB's claim of ownership derives from the fact that, on July 23, 1987, the Ebenezer Church in Baltimore merged into AUB. Ebenezer had supervisory authority over the ecclesiastical affairs of Black Rock, pursuant to the 1978 Articles, by virtue of their common membership in the Baltimore Association. The baptised members of the council of Ebenezer, acting on behalf of the Church at Black Rock -- again, in conformity with the custom and usage of the Primitive Baptist faith, and therefore the laws of the State of Maryland -- then merged Black Rock into AUB on April 16, 1988.

Second, the individual Petitioners had "a legitimate claim of entitlement," within Roth, 408 U.S. at 577, to continue to act as Trustees of the Church, carrying out their mandate from the membership, and what they profoundly believe to be their obligation to their Faith. Moreover, that claim too is founded in State law, since the Maryland Religious Corporations Act provides for management of churches. The governance of the Church at Black Rock, incorporating the constitution of the Board

---

[18] See, e.g., Calvary Presbyterian Church of Baltimore City v. Presbytery of Baltimore of the United Presbyterian Church in the United States, 386 A.2d 357, 363 (Md. Ct. Spec. App. 1978) ("Title to property cannot be allowed to drift about in an atmosphere of uncertainty. It must be vested in someone . . . 'and in such force, that an injury to the possession can be redressed by an action at law.'"); Air Lift, Ltd. v. Board of County Comm'rs of Worcester County, 278 A.2d 244, 257 (Md. 1971) ("An owner of land has the right to use his land for any lawful purpose, subject to regulations imposed by the State in the proper exercise of its police power.").

of Trustees that included the individual Petitioners, scrupulously adhered to the precepts of that Maryland law.

B. Petitioners Did Not Receive Due Process of Law

It is certainly true that every disappointed litigant who passionately believes that the disposition of her case was utterly wrong has not by virtue of having lost been deprived of due process of law. Nevertheless, as this Court stated in Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982), "the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged." That opportunity was denied to these Petitioners. Worse: it was denied on the basis that the Constitution forbade judicial resolution of a case that, in truth, was well within the perimeter of permissible adjudication.

While the merits of this case have never been "fairly judged," the result of the courts' declining to rule on Petitioners' challenge to the arbitrators' report is that one of the disputants has won, and the other lost. One side has been deprived of property interests protected by the Constitution, and the other has undeservedly enjoyed those benefits. And all of this with no judicial hearing, because each of the three Maryland courts had a reason for believing that adjudication of this controversy would run afoul of constitutional prohibitions.

In fact, the opposite is true. Petitioners raised not doctrinal but purely secular objections to the convocation, conduct, and results of a meeting, purportedly of the governing body of a corporation (albeit a religious one). Their objections went -- and to this day go -- unheard. They have not received due process of law. They have not received any process of law at all.

Petitioners therefore respectfully submit that, were this Court to determine that the decision of the Court of Appeals of Maryland was wrong in its invocation of the First Amendment to

the Constitution of the United States as a basis for declining to reach the merits of this dispute, then that decision itself is a denial of due process of constitutional dimension. For this reason too, the decision below should be reviewed and reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Harry R. Hughes
Steven M. Schneebaum*
PATTON BOGGS, L.L.P.
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6300

Counsel for Petitioners
*Counsel of Record

Date: November 17, 1994

APPENDIX

Opinion of Court of Appeals
Opinion of Court of Special Appeals
Opinion of Circuit Court for Wicomico County
Report of Arbitrators
Excerpts of Maryland Code
Selected (1978 Restated) Articles of Incorporation
Selected Bylaws

644 Atlantic 2d Series 1063
(335 Md. 564)

The AMERICAN UNION OF BAPTISTS, INC. et al.
v.
The TRUSTEES OF the PARTICULAR PRIMITIVE BAPTIST CHURCH AT BLACK ROCK, INC. et al.

No. 154, Sept. Term, 1993

Court of Appeals of Maryland
June 28, 1994

Reconsideration Denied Aug. 19, 1994

* * *

James L. Otway (Anthenelli & Otway, all on brief), Salisbury, for petitioner. [Page 1064]

C. William Clark (Anthony T. Bartlett, argued, Ruppersberger, Clark and Mister, all on brief), Timonium, for respondent.

Argued before MURPHY, C.J., and ELDRIDGE, RODOWSKY, CHASANOW, KARWACKI, BELL and RAKER, J.J.

KARWACKI, Judge.

This case requires us to step once again into the complexities of the relationship between church and state. At issue is the ownership and control of certain church property. Two groups claim to have validly elected the Board of Trustees of the Particular Primitive Baptist Church at Black Rock, Inc. The petitioner, the American Union of Baptists, Inc. (AUB), is a religious corporation located in Salisbury, Wicomico County, Maryland.[1] The respondent, the Trustees of the Particular

Primitive Baptist Church at Black Rock, Inc. (Black Rock), is a religious corporation located in Butler, Baltimore County, Maryland.

The background to this dispute is described in the opinion of the Court of Special Appeals:

> "Black Rock was incorporated in 1891, and filed Articles of Amendment and a Restatement of its Articles of Incorporation with the State Department of Assessments and Taxation (SDAT) in 1978. In 1979, at its first annual meeting after filing Articles of Amendment, Black Rock elected a Board of Trustees. The Board of Trustees then chose Eugene F. Osborne, Sr. (Osborne) as President and George R. Welden (Welden) as Vice-President. The Board of Trustees and its officers were to serve terms of four years. At Black Rock's annual meeting in 1983, Osborne and Welden were reelected to additional terms of four years.

---

[1] Maryland Code (1974, 1993 Repl. Vol.), §§ 5-301 *et seq.* of the Corporations and Associations Article provides for the incorporation of local religious congregations so that such entities may hold, control, and have the power to dispose of property under the laws of the state. For an explanation of Maryland's General Religious Corporation Law, see *Maryland and Va. Eldership v. Church of God at Sharpsburg*, 249 Md 650, 241 A.2d 691 (1968) (*Eldership I*), *vacated and remanded*, 393 U.S. 528, 89 S.Ct. 850, 21 L.Ed.2d 750 (1969), and *Maryland and Va. Eldership v. Church of God at Sharpsburg*, 254 Md. 162, 254 A.2d 162 (1969) (*Eldership II*), *appeal dismissed*, 396 U.S. 367, 90 S.Ct. 499, 24 L.Ed.2d 582 (1970).

"Osborne called a special meeting of the Board of Trustees on December 8, 1986, to consider his motion to dissolve Black Rock. According to Osborne, Black Rock no longer existed [as a church] because its minister had died and none of its members were living.[2] After Osborne's motion failed, a group of trustees led by him (the Osborne group), filed a complaint in the Circuit Court for Baltimore County seeking the involuntary dissolution of Black Rock. The complaint was dismissed, an appeal followed, and [the Court of Special Appeals] affirmed the judgment of the circuit court [in an unreported opinion. *Osborne v. Trustees of the Particular Primitive Baptist Church of Black Rock, Inc.*]

"In May of 1987, several members of Black Rock's Board of Trustees, led by George Welden (the Welden group), called a special meeting for June 13, 1987, to elect new officers.[3]

---

2 Apparently, Osborne does not consider the current congregation of Black Rock to be "members" of the church because they allegedly have an "open communion." The record does not divulge, and we need not discern, the precise meaning of "open communion;" it will suffice to recognize that it is a matter of church doctrine.

3 Respondents assert that the special meeting was called only after

Prior to the meeting, Osborne notified the Welden group that any action taken at the special meeting would be invalid because Black Rock's bylaws provided that only the president could call a special meeting. Nevertheless the special meeting was held, with only the Welden group present. As expected, Osborne was removed as president and replaced by Welden.

"The Osborne group retaliated, continuing to assert that Black Rock no longer existed because it had no "members," and that Ebenezer Primitive, or Old School [Page 1065] Baptist Church of Baltimore City (Ebenezer), now controlled Black Rock.[4]

"Ebenezer merged with AUB on July 23, 1987. At its first annual meeting, AUB passed

---

Osborne, then president of the Board of Trustees, failed to call an annual meeting and deliver an Annual Report to the Congregation, in contravention of his duties under Black Rock's bylaws.

4 Ebenezer's (and hence, AUB's) claim to control of Black Rock is premised on the characterization of Black Rock Church as "ecclesiastically extinct" due to the death of its last "member" in 1972. Apparently, both Black Rock and Ebenezer were at one time members of the Baltimore Association of Baptist Churches, an organization which had been in existence since the 1920s. Under petitioner's theory, the control of Black Rock and its property became vested solely in Ebenezer when Black Rock became "extinct" in 1972, because, "pursuant to and consistent with the recognized practice of the denomination of Primitive Baptists," Ebenezer was the "surviving sister church of the same religious persuasion."

a resolution authorizing it to elect a Board of Trustees for Black Rock. A Board of Trustees for Black Rock was then elected and Osborne was installed as its president. After it had been elected, the Board passed a resolution merging Black Rock into AUB. Articles of Merger were filed with the SDAT.

"On July 12, 1988, Black Rock filed a complaint in the Circuit Court for Baltimore City seeking a declaration of Black Rock's properly elected Board of Trustees. Black Rock also sought an order directing the SDAT to strike the Articles of Merger filed by AUB. In addition, Black Rock asked the circuit court to enjoin AUB from attempting to transfer Black Rock's property and assets. After Black Rock's complaint was transferred to the Circuit Court for Wicomico County, the judicial proceedings were stayed pending arbitration. Following an arbitration award in favor of Black Rock, AUB moved to vacate the award and Black Rock moved for summary judgment. The circuit court denied AUB's motion and granted summary judgment in favor of Black Rock."

American Baptists v. Trustees, 98 Md.App. 10, 12-14, 632 A.2d 226, 227 (1993) (footnotes omitted). The Court of Special Appeals affirmed the judgment of the circuit court after it determined that an arbitration award entered under Maryland Code (1974, 1993 Repl. Vol.), § 5-310 of the Corporations and Associations Article was not subject to judicial review.[5] The intermediate appellate court stated:

> "It is evident from the Court's rationale in [*Maryland & Va.*] *Eldership* [*of Churches of God v. Church of God at Sharpsburg, Inc.*, 249 Md. 650, 241 A.2d 691

---

[5] Md. Code (1974, 1993 Repl. Vol.), § 5-310 of the Corporations & Associations Article provides:

> **§ 5-310. Arbitration of contested election.**
>
> (a) *Selection of arbitrators.* - If any contest arises over the voting rights or the fair conduct of an election
>
> (1) Each contending party shall appoint one individual from among the members of a neighboring church of the same religious persuasion or, if there is no such church, from among the members of any other church; and
>
> (2) The two appointed individuals shall select a third, similarly qualified, individual.
>
> (b) *Location of arbitration.* - The arbitrators shall meet at the place where the contest arose and hear and determine the matter.
>
> (c) *Final determination of arbitration.* - The judgment or award of a majority of the arbitrators, signed and acknowledged by them, is final."

The constitutionally of the statute and of the appointment of arbitrators thereunder was not challenged, either before this Court or in proceedings below.

> (1968)] that § 5-310 [of the Corporations and Associations Article] was enacted so that it would be unnecessary for courts to resolve issues of church polity that inevitably arise in disputed church elections. Thus, it follows that the word 'final' in § 5-310(c) has a different meaning than it has in a dispute not involving issues of church polity. As we see it, when using the word 'final' in § 5-310(c), the legislature intended that such an award not be subject to judicial review."

American Baptists v. Trustees, 98 Md.App. at 16, 632 A.2d at 228. The Court of Special Appeals addressed the merits of the case only briefly, stating that even if the award had been subject to judicial review, the court would have nonetheless "affirmed the judgment of the circuit court, because the award of the arbitrators was not 'completely irrational.'" *Id.* at 17-18, 632 A.2d at 229.

In its petition for certiorari, AUB asserted that the Court of Special Appeals erred in its holding that an arbitration award entered under § 5-310 is not subject to judicial review. [Page 1066] We granted AUB's petition, and although we agree that the intermediate appellate court erred in its interpretation of § 5-310(c), we nevertheless agree with that court that the award in the instant case is not subject to judicial review, and we will affirm the judgment of the lower court.

I.

[1] AUB contends, among other things, that it is assured a right of review by Maryland's Uniform Arbitration Act. Md.Code (1974, 1989 Repl.Vol.), § 3-201 *et seq.* of the Courts Article. Because the two parties were unable to agree on the third

arbitrator pursuant to § 5-310(a)(2) of the Corporations and Associations Article, the court appointed the third arbitrator in this dispute. AUB contends that this action is sufficient to bring the matter within the Uniform Arbitration Act.[6] In answer to this contention, the Court of Special Appeals stated that "it is clear from the record before us that arbitration, in this case, was conducted pursuant to §§ 5-301, *et seq.*, [of the Corporations and Associations Article].... We do not believe that the action of the circuit court [in appointing a third arbitrator after the two parties were deadlocked] brought arbitration under [the Uniform Act]." *American Baptists*, 98 Md. App. at 17, 632 A.2d at 229. We agree with the intermediate appellate court's analysis. Under the Uniform Act, a court derives jurisdiction to review and enforce an arbitration award from the existence of an agreement between the parties. Md.Code (1974, 1989 Repl.Vol.) § 3-202 of the Courts Article. The instant arbitration, however, does not arise from an agreement between the parties to settle their disputes. Rather, the arbitration in the case *sub judice* is required by statute; the parties have no choice but to arbitrate this dispute in the precise manner prescribed by § 5-310 of the Corporations and Associations Article. As such, it is not subject to the strictures of the Uniform Arbitration Act. Rather, the standard for judicial review is governed by common law arbitration rules. See

---

[6] Md.Code (1974, 1989 Repl.Vol.), § 3-211(c) of the Courts Article provides:

> **"§ 3-211. Appointment of arbitrators.**
>
> (c) *Appointment by court.* - A court shall appoint one or more arbitrators if:
>
> (1) The arbitration agreement does not provide a method of appointment;
>
> (2) The agreed method fails or for any reason cannot be followed; or
>
> (3) An appointed arbitrator fails or is unable to act and his successor has not been appointed."

Baltimore County v. City of Baltimore, 329 Md. 692, 701 n. 3, 621 A.2d 864, 868 n. 3 (1993) (arbitration between city and county which was mandated by statute was governed by common law and not by the Maryland Uniform Arbitration Act). *See also* James R. Madison, *In Search of a Standard for Judicial Review of Legal Error in Commercial Arbitration Awards*, 21 Golden Gate U.L.Rev. 245 (1991) (although courts should refrain from reviewing award when parties of relatively equal bargaining strength agree to arbitration, a different rule is appropriate where arbitration is essentially forced on a party, as when mandated by statute).

[2] We will turn, then, to the common law grounds for judicial review of an arbitration award. This Court has long held arbitration to be a favored method of dispute resolution; consequently, we have "generally deferred to the arbitrator's findings of fact and applications of law." *Baltimore County v. City of Baltimore, supra*, 329 Md. at 701, 621 A.2d at 868, quoting *Board of Education v. Prince George's County Educators' Assoc.*, 309 Md. 85, 98, 522 A.2d 931, 937 (1987). There is nevertheless ample precedent for reviewing such awards under certain conditions. After reviewing the history of judicial review of arbitration awards in Maryland, Judge Eldridge, writing for the Court in *Board of Education*, enumerated several instances in which review would be warranted and summarized the standard thus:

> Under Maryland common law standards for reviewing arbitration awards ... we hold that an award is subject to being vacated for a 'palpable mistake of law or fact ... apparent on the face of the award' or for a 'mistake so gross as to work manifest injustice.'"

309 Md. at 105, 522 A.2d at 941.

It is clear from this history, then, that unless specifically prohibited by § 5-310 of [Page 1067] the Corporations and Associations Article, an arbitration award made under that section is reviewable by a court. The Court of Special Appeals found that such a specific prohibition did exist in the legislature's use of the word "final," contending that "the word 'final' in § 5-310(c) has a different meaning than it has in a dispute not involving issues of church polity."

We frankly can find no support for this construction of the term "final". Ordinarily, the term "final" does not preclude judicial review. In fact, achievement of a "final" judgment is, with few exceptions, a prerequisite to judicial review. *See, e.g., Popham v. State Farm*, 333 Md. 136, 142, 634 A.2d 28, 31 (1993) ("Unless an appeal is from a final judgment, the appellate court does not acquire subject matter jurisdiction to review it"); *National Glass v. J.C. Penny Properties,* 329 Md. 300, 619 A.2d 528 (1993) ("As a general rule an appeal will lie only from a final judgment"); Md.Code (1974, 1989 Repl.Vol.), § 12-301 of the Courts Article. Certainly, under the Uniform Act, the use of the term "final" does not preclude judicial review: § 3-215 of the Courts Article specifies that a majority of the arbitrators may render a final award, and §§ 3-223 and 3-224 enumerate specific circumstances under which a "final" arbitration award may be corrected, modified, or vacated by a court. Although this case is not governed by the Uniform Act, we see no reason to apply a different meaning to the term "final" under the common law standard. In fact, we recently reviewed a "final" arbitration award under the common law standard in *Baltimore County v. City of Baltimore, supra. Baltimore County* is similar to the case *sub judice* insofar as it arose from a motion to vacate a portion of an arbitration award. There, as here, the arbitration proceeding was conducted pursuant to a statutory mandate as opposed to a bilateral agreement to arbitrate. *Id.*, 329 Md. at 696 n. 1, 621

A.2d at 866 n. 1. Moreover, the provisions governing the proceeding in *Baltimore County* provided that "the written decision of the majority of the board of arbitrators shall be final and binding upon both parties." § 35-133 of the Baltimore County Code (1988 & Supp. 1994). Notwithstanding the use of the term "final" in the statute, we did review the award under the common law standard. We applied the deferential standard of review discussed above, and we affirmed the judgment of the circuit court, which had in turn affirmed the arbitration award in its entirety.

[3] We see no reason why "final" should be treated differently in this statute than elsewhere. The Court of Special Appeals apparently based its conclusion to the contrary on its perception that "issues of church polity... *inevitably* arise in the case of disputed church elections." *American Baptists*, 98 Md.App. at 16, 632 A.2d at 228 (emphasis added). This conclusion rests on a faulty premise. Disputed church election may often involve issues of church polity, but not necessarily so. It is not difficult to envision, for example, a disputed church election that concerns allegations of voter fraud, ballot-box stuffing, incorrectly printed ballots, or other misdeeds that are quite secular in nature. We cannot say that the legislature intended § 5-310 of the Corporations and Associations Article to prohibit courts from exercising jurisdiction over such secular matters.[7]

---

[7] Even if we determined that such was the legislative intent, it is doubtful that the legislature could deprive the courts of secular jurisdiction. Although there is no question that the legislature may impose "rational conditions upon the right to turn to the courts for redress of grievances," *Attorney General v. Johnson*, 282 Md. 274, 282-83, 385 A.2d 57, 62, *appeal dismissed*, 439 U.S. 805, 99 S.Ct. 60, 58 L.Ed.2d 97 (1978), disapproved on other grounds, *Newell v. Richards*, 323 Md. 717, 734, 594 A.2d 1152, 1161 (1991), it may not "interfere with the judicial process by depriving litigants from raising questions involving their fundamental rights in any appropriate judicial manner, nor can it deprive the courts of the right to decide such questions in an appropriate proceeding." *Criminal Injuries Comp. Bd. v. Gould*, 273 Md. 486, 500, 331 A.2d 55, 65-55 (1975), citing *Schneider v. Pullen*, 198 Md. 64, 68, 81 A.2d 226, 228 (1951). In the case of alleged election fraud, the arbitration requirement of §

Thus, we do not agree that § 5-310 contains a blanket prohibition of judicial review of arbitration awards. Such awards may or-[Page 1068]dinarily be reviewed under the common law standard. Nevertheless, the intermediate appellate court correctly perceived that in many instances, issues of church polity will be inextricably intertwined with secular issues in contested church elections. Each set of circumstances must be evaluated on an individual basis by the court to determine whether, under the facts of that particular case, a court would be forced to wander into the "theological thicket" in order to render a decision. In such a situation, courts may indeed be prohibited from reviewing arbitration awards, not by operation of statue, but because such review would require an impermissible entangling of church and state.

II.

[4] The instant case involves not only a disputed election; it is also a contest for the control of Black Rock's property and assets. Courts have often been called upon to resolve disputes over church property, yet each case presents difficulties. As a practical matter, courts cannot flatly decline to address a secular dispute over title to property simply because it arose against a religious background. The late Chief Judge Richard P. Gilbert, writing for the Court of Special Appeals, recognized this and noted: "Were it otherwise, controversies ... might never be resolved, and the title to the church property would be enmeshed in a quagmire from which extrication would be nearly impossible. Title to property cannot be allowed to drift about in an atmosphere of uncertainty." *Calvary Pres. Church v. Presbytery*, 39 Md. App. 405, 417, 386 A.2d 357, 363 (1978). As we stated in *Maryland and Va. Eldership v. Church of God at Sharpsburg*, 249 Md. 650, 676, 241 A.2d 691, 706 (1968) (*Eldership I*), *vacated and remanded*, 393 U.S. 528, 89 S.Ct. 850, 21 L.Ed.2d 750 (1969),

---

5-310 is certainly a rational condition upon the right to turn to the courts, but the legislature could not impose a blanket prohibition of all judicial review of arbitration awards resulting from application of § 5-310.

"Either the majority or the minority must be held to control the local church property and the equity court must make the decision so that the property rights are lawfully established by judicial process rather than by possible self-help." At the same time, a court confronted with such a dispute is under considerable constitutional constraints. The Supreme Court has stated the conflict thus:

> "The State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively. It is also clear, however, that 'the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes.' Most importantly, the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice."

Jones v. Wolf, 443 U.S. 595, 602, 99 S.Ct. 3020, 3025, 61 L.Ed.2d 775, 784 (1979) (citations omitted). Although the line separating those disputes which are grounded in religious doctrine from those which concern purely secular matters is often difficult to discern, we have in many cases been able to resolve church property disputes with the application of neutral principles of law. In *Hayman v. St. Martin's Evangelical Lutheran Church*, 227 Md. 338, 176 A.2d 772 (1962), for example, we interpreted the corporate charter and by-laws of a parent church and a local church that had voted to withdraw from the parent organization in

order to resolve a dispute between the two over the church property. Shortly thereafter, in *Eldership I* and *Maryland* and *Va. Eldership v. Church of God at Sharpsburg*, 254 Md. 162, 254 A.2d 162 (1969) (*Eldership II*), *appeal dismissed*, 396 U.S. 367, 90 S.Ct. 499, 24 L.Ed.2d 582 (1970), we determined that Maryland's Religious Corporation Law was a "neutral principle of law," and we examined the deeds by which the properties in question were conveyed to the local churches, the charters of the local church corporations, and the provisions contained in the constitution of the parent organization. We held that we could resolve the dispute in that case without involving the Court in any theological or doctrinal matter. *See also Babcock Mem. Pres. Ch. v. Presbytery*, 296 Md. 573, 464 A.2d 1008 (1983) (resolving interests in property by determining whether the church polity was congregational or hierarchical in nature; such as inquiry required application of neutral principles of law), *cert. denied*, 465 U.S. 1027, 104 S.Ct. 1287, 79 L.Ed.2d 689 (1984).

[Page 1069] [5] There are circumstances, however, under which a civil court should *not* intervene, even if a dispute centers on church property. The Supreme Court's decision in *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969) illustrates such circumstances well. Under Georgia law at that time, the right to property previously used by local churches was made to turn on whether the general church abandoned or departed from the tenets of faith and practice it held at the time the local church became affiliated with it. In *Presbyterian Church,* local churches renounced the jurisdiction and authority of the national church, asserting that the general church had departed from its original doctrine. After the general church attempted to reclaim the property of the local churches (title to which was held by the local churches themselves), the local churches filed suit in a civil court, seeking to enjoin the national church from trespassing on the property. In order to grant the injunction, however, the court would have been required to determine which

doctrines were fundamental to church beliefs and whether the alleged departures from doctrine were substantial. The Supreme Court held that civil courts could not address these issues without violating the constitution. 393 U.S. at 451, 89 S.Ct. at 607, 21 L.Ed.2d at 667. We cited this decision with approval in *Polen v. Cox*, 259 Md. 25, 267 A.2d 201 (1070), concluding that "[t]he standard [to be used by the courts in determining whether they may resolve church property disputes] must be whether the parties by the acts and documents which have governed their relationship have made it possible for a civil court to resolve control of property without the court itself having to make ecclesiastical determinations." 259 Md. at 32, 267 A.2d at 205. This is the standard that we shall apply today.

[6] AUB asserts that the instant dispute requires no doctrinal inquiry, but only a review of Maryland corporate law under neutral principles of law. The record indicates otherwise, however. The crux of AUB's argument is that, because the bylaws vest the power to call meetings solely in the president of the Trustees, the June, 1987 special meeting was invalid and all actions taken there are void. At the same time, however, AUB claims that Osborne, then president of the Trustees, was under no obligation to call a meeting of the Trustees because the church no longer existed. It is clear to us that the outcome of this dispute hinges on whether, at the time of its June, 1987 special meeting, the Welden group possessed the powers granted to trustees by § 5-306 of the Corporations and Associations Article to act on behalf of the church. This, in turn, depends on whether Osborne, as president of the Trustees, failed in his duties as president by declining to call an annual meeting, thus allowing Welden, as vice president, to "assume the duties of the president" as permitted by the bylaws. If the church was extinct, then Osborne clearly had no continuing duty to call such meetings. If the church was not extinct, however, then Welden may well have possessed the power to call the meeting. The root question, then, is whether the Particular Primitive Baptist Church at Black Rock was "extinct"

in 1987. The church would be deemed extinct if it had no members; the existence of members, conversely, would keep the church alive. It is well settled in this State that the determination of a membership in a church is a question well embedded in the "theological thicket" and one that will not be entertained by the civil courts. *Evans v. Shiloh Baptist Church*, 196 Md. 543, 551, 77 A.2d 160, 163 (1950). The record in this case only emphasizes this point; Osborne's refusal to recognize the congregation of the church as "members" is apparently grounded in the fact that the congregation allegedly allows an "open communion." Clearly, the propriety *vel non* of an "open communion" in the Primitive Baptist faith is not within the purview of the civil courts. Yet, such a determination is crucial to the ability to decide whether the church had valid "members". Moreover, even if we were somehow to assume that the church was in fact "extinct," we cannot say that control of the church and its property would pass automatically to Ebenezer or AUB, as petitioner asserts. Ebenezer allegedly obtained it authority over Black Rock pursuant to the "recognized practice of the denom-[Page 1070]ination of Primitive Baptists." Again, in order to decide this matter, we would be required to resolve the property disposition based on our interpretation of religious custom and polity. This we cannot do.

Because the legitimacy of the Welden group's actions depends on the question of "ecclesiastical extinction," which in turn hinges on the membership issue, this dispute cannot be resolved, despite AUB's claims to the contrary, without inquiries into the religious doctrine and custom of the Primitive Baptist faith. The constitution will not permit such inquiries, and we will therefore not review the award of the arbitrators in the instant case.

JUDGMENT AFFIRMED. COSTS IN THIS COURT AND THE COURT OF SPECIAL APPEALS TO BE PAID BY PETITIONERS.

632 Atlantic Reporter, 2d Series 226
(98 Md.App.10)

The AMERICAN UNION OF BAPTISTS INC., et al
v.
The TRUSTEES OF THE PARTICULAR PRIMITIVE BAPTIST CHURCH AT BLACK ROCK, INC., et al

No. 1974, Sept. Term, 1992

Court of Special Appeals of Maryland
Oct. 28, 1993
Certiorari Granted Jan. 28, 1994

* * *

James L. Otway (Anthenelli & Otway on the brief), Salisbury, for appellants.

C. William Clark (Anthony T. Bartlett and Ruppersberger, Clark & Mister on the brief), Timonium, for appellees.

Argued before WENNER, CATHELL and DAVIS, JJ.

WENNER, Judge.

The genesis of this appeal is an intense rivalry between two religious groups, each claiming to have properly elected the Board of Trustees of the Particular Primitive Baptist Church at Black Rock, Inc. Appellant, the American Union of Baptists, Inc. (AUB), is a religious corporation located in Salisbury, Wicomico County, Maryland. Appellee, the Trustees of the Particular Primitive Baptist Church at Black Rock, Inc., (Black Rock) is a religious corporation located in Butler, Baltimore County, Maryland. AUB has noted an appeal from a judgment of the Circuit Court for Wicomico County, granting Black Rock's

Motion for Summary Judgment and denying AUB's motion to vacate the Arbitrators; award.[1] For reasons we shall explain, we shall affirm the judgment of the circuit court. [Page 227]

Background

Black Rock was incorporated in 1891, and filed Articles of Amendment and a Restatement of its Articles of Incorporation with the State Department of Assessments and Taxation (SDAT) in 1978. In 1979, at its first annual meeting after filing Articles of Amendment, Black Rock elected a Board of Trustees. The Board of Trustees then chose Eugene F. Osborne, Sr. (Osborne) as President and George R. Welden (Welden) as Vice-President. The Board of Trustees and its officers were to serve terms of four years. At Black Rock's annual meeting in 1983, Osborne and Welden were reelected to additional terms of four years.

Osborne called a special meeting of the Board of Trustees on December 8, 1986, to consider his motion to dissolve Black Rock. According to Osborne, Black Rock no longer existed because its minister had died and none of its members were living.[2] After Osborne's motion failed, a group of trustees led by him (the Osborne group), filed a complaint in the Circuit Court for Baltimore County seeking the involuntary dissolution of Black Rock. The complaint as dismissed, an appeal followed, and we affirmed the judgment of the circuit court.[3]

In May of 1987, several members of Black Rock's Board of Trustees, led by George Welden (the Welden group), called a

---

[1] Arbitration was held after appellant filed a Motion to Compel Arbitration pursuant to § 5-310 of the Corporations and Associations Article. As provided for in § 5-310, each side chose an arbitrator. When the parties could not agree on a third arbitrator, the Circuit Court for Wicomico County was called upon to appoint a third arbitrator.

[2] Although a congregation still worshiped at Black Rock's church, Osborne did not recognize the congregation as "members."

[3] *Osborne v. Trustees of the Particular Primitive Baptist Church of Black Rock, Inc.*, No 748, Sept. Term 1987, (filed February 2, 1988).

special meeting for June 13, 1987, to elect new officers. Prior to the meeting, Osborne notified the Welden group that any action taken at the special meeting would be invalid because Black Rock's bylaws provided that only the president could call a special meeting. Nevertheless the special meeting was held, with only the Welden group present. As expected, Osborne was removed as president and replaced by Welden.

The Osborne group retaliated, continuing to assert that Black Rock no longer existed because it had no "members," and that Ebenezer Primitive, or Old School Baptist Church of Baltimore City (Ebenezer), now controlled Black Rock.

Ebenezer merged with AUB on July 23, 1987. At its first annual meeting, AUB passed a resolution authorizing it to elect a Board of Trustees for Black Rock. A Board of Trustees for Black Rock was then elected and Osborne was installed as its president. After it had been elected, the Board passed a resolution merging Black Rock into AUB. Articles of Merger were filed with the SDAT.

On July 12, 1988, Black Rock filed a complaint in the Circuit Court for Baltimore City seeking a declaration of Black Rock's properly elected Board of trustees. Black Rock also sought an order directing the SDAT to strike the Articles of Merger filed by AUB. In addition, Black Rock asked the circuit court to enjoin AUB from attempting to transfer Black Rock's property and assets. After Black Rock's complaint was transferred to the Circuit Court for Wicomico County, the judicial proceedings were stayed pending arbitration. Following an arbitration award in favor of Black Rock, AUB moved to vacate the award and Black Rock moved for summary judgment. The circuit court denied AUB's motion and granted summary judgment in favor of Black Rock. This appeal followed. On appeal, we are asked:

1. Whether the Arbitration finding that the notice of a Special Meeting of Trustees of Black Rock of June 13, 1987 was valid was completely irrational;

2. Whether the arbitration finding that the presence of five of the ten trustees constituted a quorum and majority was completely irrational.

We note with interest that while AUB has neglected to raise the issue of whether an arbitration award entered under Corporations and Associations Article (CA) § 5-310[4] is subject to judicial review, Black Rock has raised it. As this is a threshold issue, we [Page 228] shall consider it before addressing the other issues.

Section 5-310 provides a specific method for resolving disputes concerning the fair conduct of elections by religious corporations:

> **(a)** ***Selection of Arbitrators.*** **-** If any contest arises over the voting rights or the fair conduct of an election:
>
> (1) Each contending party shall appoint one individual from among the members of a neighboring church of the same religious persuasion or, if there is no such church, from among the members of any other church; and
>
> (2) The two appointed individuals shall select a third, similarly qualified, individual.
>
> **(b)** ***Location of Arbitration.*** **-** The arbitrators shall meet at the

---

[4] Subtitle 3. Religious Corporations. Part I. In General.

> place where the contest arose and hear and determine the matter.
>
> (c) ***Final determination of arbitration.*** - The judgment or award of the arbitrators, signed and acknowledged by them, is final.

According to Black Rock, the legislature enacted CA §§ 5-301, *et seq.*, to preserve the separation of church and state. Consequently, Black Rock asserts that the word "final" in § 5-310(c) prohibits judicial review of an arbitration award.

Even though AUB concedes that a court may not determine matters of church polity, AUB nonetheless contends that, under the circumstances of the case *sub judice*, the arbitration award is subject to judicial review because matters of general corporation law, rather than matters of church polity, are here involved. Thus, AUB contends not only that the word "final" in § 5-310(c) does not preclude judicial review, but that § 3-224 of the Courts & Judicial Proceedings Article (CJP) is here applicable.[5]

CA § 5-310 first appeared in Chapter 471, § 161 of the Laws of Maryland, 1868, and was added to a group of laws constituting a subtitle concerning religious corporations, now contained in CA §§ 5-301, *et seq.* This subtitle was first enacted by the General Assembly as Chapter 11 of the Laws of 1802. *Maryland & Va. Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 249 Md. 650, 241 A.2d 691 (1968) (*Eldership I*), *vacated*, 393 U.S. 528, 89 S.Ct. 850, 21 L.Ed.2d 750 (1969), *on remand*, 254 Md. 162, 254 A.2d 162 (1969) (*Eldership II*), *aff'd*, 396 U.S. 367, 90 S.Ct. 499, 24 L.Ed.2d 582 (1970) (per curiam). In *Eldership I*, 249 Md. at 673, 241 A.2d 691, the Court of Appeals concluded that the legislature intended

---

[5] Section 3-224 is part of the Uniform Arbitration Act, § 3-201, *et seq.*, of the Courts & Judicial Proceedings Article.

> to provide for the formation of religious corporations for local congregations which would hold, control and have the power to dispose of *the property* of the religious corporation. The Act of 1802 and its successor acts in no way sought to establish any ecclesiastical policy. This was left to the corporations themselves ....

[1] It is evident from the Court's rationale in *Eldership I* that CA § 5-310 was enacted so that it would be unnecessary for courts to resolve issues of church polity that inevitably arise in disputed church elections. Thus, it follows that the word "final" in CA § 5-310(c) has a different meaning that it has in a dispute not involving issues of church polity. As we see it, when using the word "final" in CA § 5-310(c), the legislature intended that such an award not be subject to judicial review.

As we said earlier, AUB asserts that inasmuch as the dispute in the instant case involves only general corporation law, judicial review is permitted. AUB contends that while courts may not resolve disputes concerning matters of religious polity, by applying "neutral principles of law," courts may resolve disputes concerning church property. *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449, 89 S.Ct. 601, 606, 21 L.Ed.2d 658 (1969); *Eldership II*, 254 Md. at 165, 254 A.2d 162.

[2] In the case *sub judice*, control of Black Rock's property depends upon determining Black Rock's properly elected Board [Page 229] of Trustees. In making that determination, it was necessary for the arbitrators to consider not only the events that preceded arbitration, but the religious polity of Ebenezer and AUB. Even if we were to apply only "neutral principles of law,"

that would be incidental to determining which trustees constitute Black Rock's properly elected Board of Trustees.[6] It is obvious to us that, in order to make this determination, it was necessary for the arbitrators to consider religious polity. Therefore, CA § 5-310(c) prohibits judicial review.

AUB also contends that Rule E-2 mandates judicial review. Rule E-2 provides that:

> After a final award has been made in writing in an arbitration to which the Maryland Uniform Arbitration Act is inapplicable, court proceedings may be had to confirm, vacate, modify, correct, or enter judgment on the award. In any such case, the provisions of the Maryland Uniform Arbitration Act concerning the proceedings shall be applicable.

Inasmuch as the legislature enacted CJP §§ 3-201, *et seq.*, and CA §§ 5-301 *et seq.*, for entirely different purposes, and as we have said, it was necessary for the arbitrators to consider religious polity in determining Black Rock's properly elected Board of Trustees, CA § 5-310(c) prohibits judicial review.

In the alternative, AUB contends that the issues it has here raised are subject to judicial review because it was necessary for the circuit court to appoint a third arbitrator. As AUB points out, CJP § 3-211(c) permits courts to appoint an arbitrator under such circumstances, while CA § 5-310 does not.

---

[6] In a per curiam opinion, affirming *Eldership II*, 396 U.S. 367, 90 S.Ct. 499, 24 L.Ed.2d 582 (1970), Justice Brennan, joined by Justices Douglas and Marshall, authored concurring opinions in an attempt to clarify the role of state courts in resolving disputes concerning church property. Justice Brennan said that courts may get involved in property disputes "only if the appropriate church governing body can be determined without the resolution of doctrinal questions and without extensive inquiry into religious polity." *Id.* at 370, 90 S.Ct. at 501.

While this is true, it is clear from the record before us that arbitration, in this case, was conducted pursuant to CA §§ 5-301, *et seq*. To be sure, it was necessary for the circuit court to appoint the third arbitrator; but this became necessary after it became evident that AUB and Black Rock were hopelessly deadlocked in selecting a third arbitrator. We do not believe that the action of the circuit court brought arbitration under CJP §§ 3-201, *et seq*.

Having concluded that CA §§ 5-301, *et seq*., are here applicable, we need not consider the issues raised by AUB. Even if we had considered them, we would have affirmed the judgment of the circuit court, because the award of the arbitrators was not "completely irrational."

JUDGMENT AFFIRMED.

(Unpublished Decision)

THE TRUSTEES OF THE PARTICULAR PRIMITIVE BAPTIST CHURCH AT BLACK ROCK, INC., et al

v.

THE AMERICAN UNION OF BAPTISTS, INC., et al

In the Circuit Court for Wicomico County
Case No. 89CV1190

November 13, 1992

ORDER

Upon consideration of the foregoing Motion for Summary Judgment it is this 13th day of November, 1992, by the Circuit Court for Wicomico County;

ORDERED, that the Report of the Majority Arbitrators dated October 5, 1991 be adopted; and it is further

ORDERED that the Articles of Merger dated April 16, 1988 filed with the State Department of Assessments and Taxation on May 18, 1988 purporting to merge the Trustees of the Particular Primitive Baptist Church at Black Rock, Inc. and the American Union of Baptists, Inc. are void and that they be stricken from the records of the State Department of Assessments and Taxation; and it is further

ORDERED, that a final injunction is granted enjoining the Defendants, American Union of Baptists, Inc., Milton Fountain, Victor H. Laws, Jennye A. Osborne, Eugene F. Osborne, Sr., Melvin B. Gladding and Burnell B. Williams, from taking any actions upon the purported Articles of Merger between the Trustees of the Particular Primitive Baptist Church at Black Rock, Inc. and American Union of Baptists, Inc. dated April 16,

1988, or from attempting to withdraw or transfer any funds on deposit in Account Nos. 4-030-052-7 and 4-015-293-6 in the Westminster Bank and Trust Company, Westminster, Carroll County, Maryland; Account No. 34000027 in Signet Bank, Baltimore, Maryland; and all other savings, checking, or deposit accounts that any of the named Plaintiffs have a direct or indirect interest in; and it is further

ORDERED, that the Defendants, American Union of Baptists, Inc., Milton Fountain, Victor H. Laws, Jennye A. Osborne, Eugene F. Osborne, Sr., Melvin B. Gladding and Burnell B. Williams are permanently enjoined from doing any act or attempting to exercise any control over the assets of the Trustees of the Particular Primitive Baptist Church at Black Rock, Inc.; and it is further

ORDERED, that the Defendants, American Union of Baptists, Inc., Milton Fountain, Victor H. Laws, Jennye A. Osborne, Eugene F. Osborne, Sr., Melvin B. Gladding, and Burnell B. Williams return to the Plaintiffs all assets of The Trustees of the Particular Primitive Baptist Church at Black Rock, Inc. and all indicia of ownership of the same that is in their possession, custody, or control; and it is further

ORDERED, that the Defendants, American Union of Baptists, Inc., Milton Fountain, Victor H. Laws, Jennye A. Osborne, Eugene F. Osborne, Sr., Melvin B. Gladding, and Burnell B. Williams to return to the Plaintiffs and the remaining elected Trustees of the religious corporation known as The Trustees of the Particular Primitive Baptist Church at Black Rock, Inc. all checkbooks, passbooks, and other related financial and/or corporate records pertaining to the trust account with Signet Bank for the care and maintenance of the cemetery at Black Rock Church, Account No. 340000207; and the checking and savings accounts at Westminster Bank and Trust Company, Westminster, Carroll County, Maryland, Account Nos. 4-030-052-7 and 4-015-293-6, and all other savings, checking, or deposit accounts

that any of the named Plaintiff's have a direct or indirect interest in.

[Signature of Judge Alfred T. Truitt, Jr.]

JUDGE

blackroc.msj

(Unpublished Report of Arbitrators)

THE TRUSTEES OF THE PARTICULAR PRIMITIVE BAPTIST CHURCH AT BLACK ROCK, INC. et al.

v.

THE AMERICAN UNION OF BAPTISTS, INC., et al.

Report of Arbitrators

In the Circuit Court for Wicomico County
No. 89CV1190

October 5, 1991

* * *

[Report of Arbitrators was signed by Arbitrators Bryan L. Shockley and Marvin H. Smith; Arbitrator Victor H. Laws did not sign.]

* * *

TO THE HONORABLE, THE JUDGES OF SAID COURT:

Pursuant to Md. Code (1985) Corps. & Ass'ns Article § 5-310 (a), arbitrators were selected to determine who are the duly elected trustees of the religious corporation known as "Trustees of the Particular Primitive Baptist Church at Black Rock, Incorporated." Bryan L. Shockley was selected as arbitrator by what, for the sake of simplicity, will be called the "Welden group," the plaintiffs herein. Victor H. Laws, Esq., was selected by what, for the sake of simplicity, will be called the "Osborne group," the defendants herein. When the conflicting factions were unable to agree upon a third arbitrator as specified in the statute, this Honorable Court appointed Marvin H. Smith as the third arbitrator.

Black Rock Primitive Baptist Church apparently has existed at least since the 1840's when a conveyance of a parcel of

land for its use was recorded among the land [Page 2] records of Baltimore County. Articles of incorporation of what was then styled Trustees of "The Particular Primitive Baptist Church at Black Rock, Baltimore County, State of Maryland," were recorded among the corporation records of Baltimore County in 1891. It must be remembered that, as stated in Babcock Memorial Presbyterian Church v. Presbytery, 296 Md. 573 (1983), in Maryland, and apparently in most other states, it is the trustees of a church which are incorporated, not the church itself. Those articles of incorporation provided that "[t]he number of Trustees shall be six exclusive of the Elder in charge of said congregation, each of whom shall be male members of the Particular Primitive Baptist Church over 21 years of age." There was testimony that the last male member of the church died in 1932. Likewise, there was testimony that the last female member died in 1972.

Services have been regularly held at this church. The church was reorganized in 1988 and it now has members, although they are not recognized by the Osborne group as being proper Primitive Baptists.

Articles of amendment were adopted in 1978 and duly recorded with the Department of Assessments and Taxation. By it the religious corporation was "established to found, own and operate a church by the name of Particular Primitive [Page 3] Baptist Church at Black Rock, an independent religious institution, at or near Butler, in Baltimore County," Maryland. There were to be ten trustees exclusive of the minister. The trustees were "to be elected and their successors continued at a meeting of the Congregation assembled in the Church building at a date preceding the annual meeting of the Board of Trustees, by the individuals who, according to custom and Rules of Order of the Church, have a voice in the management of spiritual and ecclesiastic affairs." The trustees were to serve for "a regular term of four years" and were to "automatically stand for reelection to additional terms until resignation, death, incapacity, or removal

pursuant to or by operation of law." In the event of a vacancy, the remaining trustees were to "fill said vacancy by majority vote or alternatively the remaining Trustees m[ight] adopt a resolution for a special election by the congregation." The charter further provides, "in the event that any election is not fully consummated the Trustees then serving shall hold over until an election and seating of Trustees is completed." It is conceded that these articles of amendment were prepared by Mr. Osborne, a member of the Maryland Bar. It is apparent that at some time subsequent to 1891 the number of trustees had been increased since these articles of amendment were executed by [Page 4] Elder John D. Wood, John B. Ensor, Melvin B. Gladding, Quincy A. Gladding, Eugene F. Osborne, Emma A. Parker, Carl H. Viers, and George R. Welden.

A copy of the by-laws were filed in evidence. These also are said to have been prepared by Mr. Osborne. They provide that "[t]he number of Trustees shall be at least four (4) exclusive of the minister, however, the Church by a 2/3rds affirmative vote may designate and elect a larger number of trustees. The trustees are elected to serve a regular term of four years."[1] They further provide that "[o]fficers shall be elected at the Trustees' annual meeting for regular four year terms starting in 1979." The president is to "call such meetings as are necessary to transact church and cemetery business."

Placed in evidence were notices from Mr. Osborne as president of the board of trustees calling meetings of such board for a number of years. His notice of April 25, 1983, lists the trustees at the top of the notice (as did earlier notices). (Of course, this was after the amendment.) The trustees then listed were Eugene F. Osborne, President; George R. Welden, Vice-President; Luwanda D. Viers, [Page 5] Secretary; Melvin B. Gladding, Treasurer; Elder John D. Wood, and Lucille Acres,

---

[1] Obviously, there is a variance between the amended charter and the by-laws as to the number of trustees.

John B. Ensor, Virginia W. Gladding, Gail Thompson, Carl H. Viers, and Russell Welden. That notice indicates that one of the actions to be taken at that meeting was "[e]lection of trustees and officers for the 1983-1987 term." The minutes of that meeting filed in evidence state, "A motion was approved to reelect present members of the Board of Trustees with officers remaining the same." In the light of the contention on the part of the defendants that somehow the actions of the trustees and the election of the trustees were done under the auspices of a sister church, which contention we shall later discuss, it is significant that not once in the many notices of meetings and the many sets of minutes filed in evidence is there ever mention that any church other than Black Rock was involved.

A number of notices from Mr. Osborne as president of the board of trustees to the trustees subsequent to the 1983 meeting were filed. Each notice has typed in at the top the list of trustees we have previously set forth. On November 25, 1986, Mr. Osborne notified the trustees of a special meeting to "be held at the Law Offices of Cook, Howard, Downes & Tracy" in Towson "for the purpose of approving the dissolution of the Corporation in accordance with Article X.(c) of the Restatement of Articles of Incorporation." [Page 6] Article X of the Articles of Incorporation deals with the distribution of assets in the event of dissolution. Subsection (a) provides for sister churches in Maryland; subsection (b) for sister churches "in the adjacent foreign jurisdictions"; and subsection (c) pertains to "a secular institution in the nature of a historical society ...." At that special meeting Mr. Osborne, Melvin Gladding and Virginia Gladding voted in favor of dissolution. George Welden, Russell Welden, Carl Viers, Luwanda Viers, John B. Ensor, and Gail Thompson voted in opposition.

Osborne and the two Gladdings, styling themselves in the caption "As Minority Trustees For and On Behalf Of The Trustees of The Particular Primitive Baptist Church at Black Rock, Inc., a

Maryland Religious Corporation," then filed an action in the Circuit Court for Baltimore County against the corporation and the remaining trustees for involuntary dissolution of the corporation. The date of such action does not appear but a summons was issued on January 27, 1987. The complaint alleged, among other things, that none of the members of the board of trustees were members of the church and that in fact the church had no members. Dissolution was sought "because the Church has no members." It was alleged, "The individual Defendant-Trustees improperly and incorrectly voted against dissolution of the Corporation at [Page 7] a Special Meeting of the Board of Trustees on December 8, 1986."

In that action an affidavit was filed from Mr. Osborne. In it he stated, "The last election of the Board of Trustees occurred in 1979." This is directly contrary to the minutes of the 1983 meeting filed in evidence. Moreover, the notice for the 1983 meeting sent out by him specifically stated that one of the items on the agenda would be the "[e]lection of trustees and officers for the 1983-1987 term."

In this affidavit Osborne states:

> "On April 1, 1978, a resolution providing for dissolution of the Corporation was recommended by the Board of Trustees, and was approved by the Council of the Church on May 7, 1978. However, the Corporation was continued in existence from 1978 to 1985 for the purpose of securing Elder Woods remaining ministry."

Filed in evidence by the defendants are the minutes of that May 7, 1978, meeting as recorded by Jennye Osborne, Eugene Osborne's wife. The minutes recite that this was "[a] special meeting ... for

the purpose of voting on amendments to the Articles of Incorporation." They state, "Trustee Eugene Osborne was asked to read the resolution of the amendments to be voted on." Filed in evidence by the defendants is what appears to be the original resolutions for amendment of the articles of incorporation as adopted by [Page 8] the trustees on April 1, 1978. These are resolutions (a) through (m), each of which was incorporated into the articles of amendment. The minutes of this May 7 meeting indicate that these various amendments were adopted. There is no reference in those minutes to a resolution for dissolution.

The affidavit further states in part:

> "12. The Church throughout its entire lifetime was a member of the Baltimore Old School Baptist Association ("Baltimore Association"). The last remaining member of the Baltimore Association was Quincy A. Gladding, who died in 1981. The Baltimore Association has not had any members since that time. The council of the church, which adopted the 1978 articles, was comprised primarily of the remaining members of the Baltimore Association. Because there have been no members of the Baltimore Association since 1981, election of the Board of Trustees and amendment of the 1978 Articles, among other items, is impossible."

According to the Court of Special Appeals in Eugene F. Osborne, Sr., et al. v. The Trustees of the Particular Primitive Baptist Church at Black Rock, Inc., et al. [No. 748, 1987 Term,

unreported per curiam, filed Feb. 1, 1988], the circuit court "on May 14, 1987, ... concluded that because the dispute between the parties involved 'a matter of ecclesiastic policy' it would not attempt to resolve the [Page 9]controversy." In affirming that action the Court of Special Appeals concluded its opinion by stating:

> "The only material dispute in the instant case is inextricably intertwined with a determination of whether the persons who worship at the Church adhere to the tenets of a certain religious faith and therefore qualify as members of that church. Such a membership qualification is not a matter for judicial determination." [Citing cases.]

On May 27, 1987, the vice-president and secretary of the corporation gave notice of a special meeting of the trustees to be held at the church on June 13, 1987, "for the purpose of holding an election of officers." In response to this notice, Osborne addressed a memorandum on the letterhead of the church to Luwanda D. Viers, George R. Welden, Melvin B. and Virginia W. Gladding, Lucille Acres, John B. Ensor, Gail W. Thompson, Carl H. Viers, and Russell Waldron stating under date of June 4, 1987:

> "Please be advised that under the provisions and express terms of the Articles of Incorporation and the Bylaws of the Particular Primitive Baptist Church at Black Rock, Inc., the offices of Secretary and Vice-President do not have authority to call any meeting 'necessary to transact church and cemetery business' (Bylaws Section 2.1).

> "Thus a Notice of a Special Meeting of Trustees, dated May 27, 1987, signed by Luwanda D. Viers and George R. Welden, for the scheduling of a meeting of trustees at 2:30, the 13th of June [Page 10] 1987 is clearly invalid and of no effect.
>
> "Should two or more persons meet in response to said invalid notice their deliberations and acts will be considered void and shall not be honored as binding upon Black Rock."

The Osborne communication did not deter the trustees from holding a meeting on June 13. We have not been provided with minutes of that meeting but there is filed in evidence a communication dated June 15, 1987, addressed to "Dear Friends of the Black Rock Church and Cemetery." It is signed by George Welden, Luwanda Viers, and Gail Thompson. It refers to the determination by the Circuit Court for Baltimore County on May 14, 1987, "that the Board of Trustees would not be dissolved as requested by a minority of the Board of Trustees." It states that the board "still being a solvent body" should have held its annual meeting for 1987 between April 1 and May 31 "according to the by-laws of the corporation" and that "an election of members of the Board of Trustees should have been held during the 1987 annual meeting." It refers to the fact that since Mr. Osborne "did not see fit to hold the annual meeting, a special meeting was requested by George Welden, Vice-President, and Luwanda Viers, Secretary." It states that this meeting was held on June 13 at the church with board members in attendance being George Welden, Luwanda Viers, Russell Welden, Gail Thompson, [Page 11] and Carl Viers. As will be seen from the listing of board members we

have heretofore made, this was a majority of the board. The letter states that "[t]he first motion made, seconded and voted on unanimously by the members present was the removal from the Office of President and from the Board of Trustees of E.F. Osborne." Reasons given for this action were:

> "1) Failure to fulfill his duties by not calling for the annual meeting of the Board of Trustees and re-election of officers.
>
> "2) Beginning and continuing litigation to dissolve the Board of Trustees and to place the church and all assets, including the cemetery, into the hands of a secular society appointed by the court having jurisdiction.
>
> "3) Holding a special meeting in a lawyers [sic] office instead of the church and allowing the lawyer to preside in his stead. Also allowing the same lawyer to act as Secretary in the presence of the duly elected Secretary without her knowledge or consent.
>
> "4) Not holding meetings as requested by the Trustees, or consulting with them on many of his actions such as: having the propane tanks removed so the church cannot be heated and changing the mailing address of the church."

The letter indicates that a motion was also passed to remove Melvin and Virginia Gladding from the board of trustees by

reason of "expiration of term." The letter reflects the election of George Welden as president, Luwanda Viers as [Page 12] vice-president, Russell Welden as treasurer, and Gail Thompson as secretary. No contention was made that this letter did not accurately reflect what took place at the meeting. The persons to whom the letter was addressed were requested to indicate whether they agreed or disagreed with the actions of the board of trustees. Entered into evidence were replies from 26 people indicating their approval of this action. If anybody communicated disapproval, we have no evidence of this fact.

On May 22, 1987, eight days after the dismissal of his action in the Circuit Court for Baltimore County and six days before his appeal to the Court of Special Appeals, Osborne set up a corporation known as American Union of Baptists, Inc. On July 18, 1987, articles of merger were entered into between that corporation and a Maryland corporation called The Trustees of Ebenezer Primitive or Old School Baptist Church of Baltimore City, Inc., of which Osborne claimed to be president.

On May 27, 1987, Osborne and the Gladdings, signing themselves as "for Black Rock Baptist Church," addressed a letter to "Supporters of Black Rock Cemetery and Friends" stating:

> "With the death in 1985 of our minister, Elder John D. Wood, God in His Wisdom and according to His purpose has seen fit to remove the last and final [Page 13] link to the Black Rock Church founded in 1828. Clearly the Church thus becomes extinct, the last member of record having died some years earlier.
>
> "Article X of the amended Articles of Incorporation under the Laws of Maryland pertains to the dissolution

of the Church (as a Maryland corporation) and provides for continued maintenance and preservation of the real assets including the Cemetery. A voluntary dissolution of the Corporation was requested, however, persons serving as a Board of Trustees divided on the issue.

"As a minority of those serving as trustees, we initiated an action in the Baltimore County Court for involuntary dissolution in an effort to determine a proper successor to the Black Rock Church, now extinct. The case was dismissed. The case has been appealed to the Maryland Court of Special Appeals.

"It is a consensus of the minority that public meetings and further solicitations for the Cemetery fund should not be made in the name of the Particular Primitive Baptist Church at Black Rock, Inc. (or more simply the Black Rock Baptist Church) pending a final disposition by the Maryland courts.

"But, please be assured, that meanwhile, our intent is to continue the care and maintenance of the Cemetery and grounds consistent with that of prior years."

On May 3, 1988, George R. Welden, as president of the board of trustees of Black Rock Church, addressed a letter to Osborne: [Page 14]

> "In accordance with the decision of the Circuit [sic] Court of Special Appeals of Maryland finding in favor of the majority of the Board of Trustees of the Black Rock Primitive Baptist Church, and the trustees meeting of June 13, 1987, it is requested that you turn over to the Board of Trustees of the Black Rock Primitive Church, all records of the church and cemetery, plus cemetery plat and sales slips, and any other items in your possession that may be construed as church or cemetery property, including extra window glass, song books, etc.
>
> "You have five days from receipt of this letter in which to respond."

On May 9, 1988, Osborne addressed identical letters to George R. Welden, J. Russell Welden, Luwanda D. Viers, Carl Viers, and E. Gail Thompson stating:

> "Your demand dated May 3, 1988 hereby is denied and rejected in its entirety on the grounds that your authority to act for Black Rock Particular Primitive Baptist Church was terminated on April 16, 1988 at a meeting of the American Union of Baptists, Inc., successor by merger to Ebenezer Primitive or Old School

Baptist Church of Baltimore City; Ebenezer Church at the time of such merger was the sole survivor of the Baltimore Association and (consistent with the recognized practice of the denomination and of civil law) in 1979 exercised its authority by electing you and others as a secular board of trustees for Black Rock Church; on April 16, 1988 the American Union of Baptists, Inc., a successor by merger of the aforesaid, exercised the same authority to remove you and elect new trustees. [Page 15]

"Accordingly you are given notice hereby that your office of trusteeship of Black Rock Church has been terminated and you are therefore discharged immediately and have no further rights, privileges, responsibilities, duty or authority as a trustee nor are you authorized to act in any manner or respect as an agent for any purpose on behalf of said Black Rock Baptist Church.

"A photo copy is attached of an extract from the April 16, 1988 Minutes together with a copy of Attachment I thereto reflecting election of the successor trustees. Putting the matter very simply your past trusteeship was established by action of the denomination, through

> Ebenezer Church as last survivor of the Baltimore Association, as Black Rock Church was then extinct. That same denomination that established your trusteeship has now acted to withdraw it and discharge you."

This was signed "For the Trustees." Filed in evidence are the minutes of the April 16, 1988, meeting of American Union of Baptists, Inc., a photocopy of a portion of which was attached to these letters. Those minutes state in part:

> "It was noted that:
>
> 1) Black Rock was a member church of the Baltimore Association of Baptist Churches continuously throughout its existence from 1828 until extinction in 1972.
>
> 2) The action of the surviving sister church of the same religious persuasion in the Baltimore Association, the Ebenezer Primitive or Old [Page 16] School Baptist Church of Baltimore City, in assuming exclusive control of the Black Rock Church was consistent with the recognized practice of the denomination and the civil laws.
>
> "Under the sole authority an action of the sister church Ebenezer Church the extinct Black Rock Church, as a corporation body of the State of Maryland, was continued in 1978 by amendment and restatement of its

> Articles of Incorporation. Then in 1979 the Ebenezer Church, again by its sole authority as the survivor of the Baltimore Association, elected a secular board of trustees for interim management of the Black Rock assets.
>
> "3) The authority of each individual serving as a secular trustee of the Black Rock Corporation is derived from the action of the Ebenezer Church and is subject to its review and control."

It will thus be seen, as we have previously mentioned, that there is a contention on the part of the defendants that Black Rock Church under the Old School of Baptists scheme of things came under the control of Ebenezer Church as the "last survivor" of the Baltimore Association, that Ebenezer Church is now merged into American Union of Baptists, and thus it is in control. The majority of your arbitrators are not persuaded by a preponderance of the evidence of a scheme of things in the Old School Baptists denomination by which this would take place. It is [Page 17] specifically noted that not once in the various notices of meetings of trustees given by Osborne is there any mention of such fact. It also is specifically noted that no such fact is mentioned in the minutes of the various meetings of the trustees of Black Rock Church. Osborne prepared the articles of amendment for Black Rock Church and signed them. This was at a time when allegedly there were no living members of Black Rock Church. There are such members today, although Osborne does not acknowledge them as such because allegedly they have an open communion. It is obvious that regular services were held at Black Rock - and continue to be so held. We hold that Osborne by his various actions is estopped to deny the existence of Black Rock Church,

in the words of the articles of amendment prepared by him, as "an independent religious institution."

We take cognizance of the 1987 meeting called by the vice-president and secretary when Osborne had declined to do his bounden duty as president of calling such meeting. We have no doubt that had the other trustees sought a writ of mandamus to compel him to call the meeting, a court of competent jurisdiction would have issued such an order. We believe that under the circumstances this was a valid meeting. It was not necessary for those present to take any action to remove Osborne as president. His term had [Page 18] expired. Be that as it may, they did remove him and we think this was a valid removal.

Thus, in accordance with the foregoing, the majority of your arbitrators find:

1. The officers of the corporation known as Trustees of the Particular Primitive Baptist Church at Black Rock, Incorporated, are:

President - George Welden

Vice-President - Luwanda Viers

Treasurer - Russell Welden

Secretary - Gail Thompson

2. The directors of said corporation are: George Welden, Luwanda Viers, Russell Welden, Gail Thompson, Carl Viers, and Emma Parker.

[Signature of Marvin H. Smith]

October 5, 1991 [Signature of Bryan L. Shockley]

Marvin H. Smith, the third arbitrator appointed by this Honorable Court, does hereby certify that he has spent 18.9 hours in connection with such arbitration and, therefore, the sum due him as arbitrator in accordance with the order of this Honorable Court is $2,362.50.

I hereby certify on this ___ day of October, 1991, a copy of the within report was mailed to:

C. William Clark, Esp.
Suite 404 - Padonia Centre
30 E. Padonia Road
Timonium, MD 21093

Victor H. Laws, III, Esq.
P.O. Box 75
Salisbury, MD 21803-0075

counsel of record for the parties.

Marvin H. Smith

MARYLAND CODE

Corporations and Associations Article

Religious Corporations

§ 5-306. Trustees - Powers.

(a) *General powers.* - The trustees have the power to:

(1) Have perpetual existence under the name of the religious corporation;

(2) Purchase, take, or acquire by gift, bequest, or in any other manner and hold any interest in any assets in the State;

(3) Use, lease, mortgage, sell, or convey the assets in the manner that the trustees consider most conducive to the interest of the religious corporation;

(4) Generally manage any assets of the religious corporation; and

(5) Adopt rules and ordinances for conducting their affairs as necessary and convenient to accomplish the purpose of the religious corporation, including:

(i) Appointing the time and place of a meeting of its members; and

(ii) Determining the number of members necessary to constitute a quorum.

(b) *Instruments prohibiting sale, mortgage, or other disposition.* - The provisions of this section do not authorize any sale, mortgage, or other disposition of any asset of the religious corporation which is held under an instrument prohibiting that sale, mortgage, or other disposition.

(c) *Authorization by trustees to execute an instrument or conveyance.* - By resolution, the trustees may authorize one or more of their members to:

(1) Execute any instrument required to be executed by the trustees, including any deed, mortgage, or other conveyance of assets which are to be sold, transferred, or encumbered; and

(2) Attest and affix to the instrument the corporate seal, if any. (An. Code 1957, art. 23, §§ 256, 257, 265; 1975, ch. 311, § 2.)

§ 5-307. Same - Duties; succession; minister.

(a) *Duties.* - The trustees shall:

(1) Keep an accurate record book;

(2) Allow inspection of the record book by members of the religious corporation; and

(3) Allow the proceedings recorded in the record book to be presented before a public meeting, if required by five or more members of the religious corporation.

(b) *Succession.* - Unless the plan provides otherwise, the trustees shall be elected and their successors continued at the time and place ordinarily used for public meetings of the church, by the individuals who, according to the custom and usage of the church, have a voice in the management and direction of congregational or temporal affairs.

(c) *Minister.* - Unless the plan permits otherwise, the minister of the church or, if there is more than one minister, the senior minister shall be a trustee of the religious corporation, in addition to the trustees required by § 5-302(b) (1) of this subtitle. (An. Code 1957, art. 23 §§ 258, 259, 261, 265; 1975, ch. 311, § 2; 1977, ch. 466; 1984, ch. 27.)

§ 5-310. Arbitration of contested election.

(a) *Selection of arbitrators.* - If any contest arises over the voting rights or the fair conduct of an election:

(1) Each contending party shall appoint one individual from among the members of a neighboring church of the same religious persuasion or, if there is no such church, from among the members of any other church; and

(2) The two appointed individuals shall select a third, similarly qualified, individual.

(b) *Location of arbitration.* - The arbitrators shall meet at the place where the contest arose and hear and determine the matter.

(c) *Final determination of arbitration.* - The judgment or award of a majority of the arbitrators, signed and acknowledged by them, is final. (An. Code 1957, art. 23, § 260; 1975, ch. 311, § 2.)

(Selected Articles)

Trustees of the Particular Primitive Baptist Church at Black Rock, Incorporated

RESTATEMENT OF THE ARTICLES OF INCORPORATION

As Amended in May 1978

* * *

The Articles of Incorporation, as twice amended, shall read as follows:

Article I. Be it enacted by the General Assembly of Maryland that a religious corporation is hereby established to found, own and operate a church by the name of Particular Primitive Baptist Church at Black Rock, an independent religious institution, at or near Butler, in Baltimore County, in this State, the corporate name of which is TRUSTEES OF THE PARTICULAR PRIMITIVE BAPTIST CHURCH AT BLACK ROCK, INCORPORATED, upon the following agreement and plan for the government of the Corporation.

The purpose of the Corporation is to provide for religious worship according to the Customs and Articles of Faith of the Primitive Baptists of the Particular faith, and to provide for other activities supportive of and incident to religious worship.

. . . .

Article III. The Trustees shall be elected and their successors continued at a meeting of the Congregation assembled in the Church building at a date preceding the annual meeting the Board of Trustees, by the individuals who, according to custom and Rules of Order of the Church, have a voice in the management of spiritual and ecclesiastic affairs. Each Trustee

shall serve gratuitously for a regular term of four years and shall automatically stand for reelection to additional terms until resignation, death, incapacity, or removal pursuant to or by operation of law. In the event a vacancy occurs the remaining Trustees may fill said vacancy by majority vote or alternatively the remaining Trustees may adopt a resolution for a special election by the congregation.

In the event that any election is not fully consummated the Trustees then serving shall hold over until an election and seating of Trustees is completed.

Article IV. The Congregation shall adopt and have power to revise from time to time Rules of Order for the management and direction of the affairs of the Church. The Trustees shall adopt and have power to revise from time to time rules and ordinances in the nature of Bylaws for conducting the proceedings of the Corporation and shall organize themselves with offices to be filled by election from said Board of Trustees and they may appoint standing committees and employ such assistance as shall be necessary to accomplish the purposes of the religious corporation.

All sessions of the Board of Trustees shall be open, for observation, to the membership of the Congregation; however, any Trustee shall have the right to call for the exclusion from said sessions any member of the general public. At all meetings of the Board of Trustees a majority of its members then serving shall constitute a quorum, the minister in charge shall act as chairman and in his absence the attending Trustee holding the highest office shall so act.

....

The Board of Trustees of the Corporation, at a meeting duly convened and held on April 1, 1978, adopted each of the resolutions in which was set forth recommended amendments to

the Charter, declaring that each said amendment of the Articles of Incorporation was advisable and directing that each recommended amendment be submitted for action thereon at a special meeting of the Council of the Church to be held on May 7, 1978 following due notice. At said special meeting of the Council of the Church, which was comprised of adult individuals of the active congregation over 21 years of age who according to custom and usage of the church were entitled to vote, each of the amendments as hereinbefore set forth was approved by affirmative vote of the required two-thirds of the Council members each of whom were present at said meeting called for that purpose.

(Selected Bylaws)

Trustees of the Particular Primitive Baptist Church at Black Rock, Incorporated

BYLAWS

Approved May 18, 1979

* * *

Section 1. Trustees

The number of Trustees shall be at least four (4) exclusive of the minister, however, the Church by a 2/3rds affirmative vote may designate and elect a larger number of Trustees. The Trustees are elected to serve a regular term of four years. In the interim between regular elections by the Church if a vacancy occurs the Trustees then serving may fill said vacancy by majority vote or alternatively the remaining Trustees may adopt a resolution for a special election by the Church.

Section 2.1 President

The highest office shall be that of President. In the absence of the minister in charge, the President shall preside at all meetings of Trustees. The President shall appoint necessary committees, fill office vacancies arising from death or resignation and call such meetings as are necessary to transact church and cemetery business. The President shall serve as Resident Agent on behalf of the Corporation and as such the President must reside in Maryland.

Section 3. Standing Executive Committee

The Executive Committee consists of the President, Vice President, Secretary and Treasurer with three members being sufficient for a quorum. The Committee shall have the power to transact routine business between meetings of the Board and when advisable it may issue a call for a special meeting of all Trustees. A written record of all Committee activities shall be prepared for inclusion in the Trustees' Book of Records.

Section 5. Meetings

Unless otherwise arranged all meetings of the Board of Trustees shall be at the Church building. Notice shall be given to all Trustees at least 10 days in advance with a statement of purpose. A simple majority of the Trustees then serving shall constitute a quorum for official action. Actions to Amend the Bylaws or to recommend Amendment of the Articles shall require the affirmative vote of a majority of the Trustees authorized and serving.

Supreme Court, U.S.
FILED
DEC 19 1994
OFFICE OF THE CLERK

No. 94-895

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1994

THE AMERICAN UNION OF BAPTISTS, INC., *et al.*,

Petitioners,

v.

THE TRUSTEES OF THE PARTICULAR PRIMITIVE BAPTIST CHURCH AT BLACK ROCK, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

RESPONDENTS' BRIEF IN OPPOSITION

C. WILLIAM CLARK
RUPPERSBERGER, CLARK & MISTER
30 E. Padonia Road
Suite 404
Timonium, MD 21093
(410) 561-3000

Counsel for Respondents

C. CHRISTOPHER BROWN*
BROWN, GOLDSTEIN & LEVY
520 W. Fayette Street
Suite 300
Baltimore, MD 21201
(410) 659-0717

* *Counsel of Record*

54 pp

Table of Contents

Page

Table of Authorities ii

SUMMARY OF REASONS WHY THE PETITION SHOULD BE DENIED 2

STATEMENT OF THE CASE 2

REASONS WHY THE PETITION SHOULD BE DENIED 7

I. Petitioners Have Not Preserved for Review All Relevant Substantive Issues 7

II. The Nature of the Dispute Below Makes Certiorari Inappropriate ... 8

III. Petitioners Pose a Mere Academic Question 10

CONCLUSION 11

APPENDIX

Brief of Appellants to Court of Appeals

Table of Authorities

Page

Statute

Maryland Code, Corps.
& Ass'ns Art. § 5-310 ..... 3, 5, 7

Rule

Supreme Court Rule 10.1 12

No. 94-895

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

THE AMERICAN UNION
OF BAPTISTS, INC., *et al.*,

Petitioners,

v.

THE TRUSTEES OF THE PARTICULAR
PRIMITIVE BAPTIST
CHURCH AT BLACK ROCK, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF MARYLAND

RESPONDENTS' BRIEF IN OPPOSITION

SUMMARY OF REASONS WHY THE PETITION SHOULD BE DENIED

- Petitioners have not preserved for appeal the core ruling below: that they are estopped from asserting a claim to control over the respondent church.

- Petitioners' Questions Presented No. 2 and 3 were not presented to the Maryland Court of Appeals.

- No dispute exists between the parties and the Court of Appeals as to the applicable First Amendment decisional rules.

- Petitioners do not challenge the Court of Appeals' application of First Amendment guidelines to the basic issues that it decided were necessary to resolve the appeal.

- Essentially, petitioners merely challenge the Court of Appeals' choice of which issues under state law were necessary to resolve the case.

STATEMENT OF THE CASE

Respondents, the Trustees of the Particular Primitive Baptist Church at Black Rock, Inc. ("Black Rock") and others, filed suit in Maryland state court in July 1988 seeking (i) a declaration that petitioners' attempt to merge the Black Rock church into the American Union of Baptists ("AUB") was invalid and (ii)

injunctive relief to require petitioners to release control of church assets.

Pursuant to Maryland Corps. & Ass'ns Art. § 5-310 and petitioners' request, this dispute was assigned to an arbitration panel, which in October 1991 issued its decision. As the Court of Appeals held and petitioners admit [Respondents' Appendix ("Resp. App.") at 21a - 22a], under Maryland law judicial review from such arbitration is extremely limited: an appellant must demonstrate that the decision is "completely irrational" or "palpably mistaken on its face."

Given this unusually narrow standard of review, the logical starting point from which to understand this case is with the only fact finding that has been done, that of the arbitration panel. Headed by a retired Court of Appeals judge, the panel (by a two-to-one vote) rejected petitioners' claim that the Black Rock church had merged into the AUB and, therefore, was under petitioners' control.

The arbitrators found[1] that the dispute over control of Black Rock (which has its origins in the 1840s in Baltimore County, Maryland) to be between the "Osborne group" (the instant petitioners) and the "Welden group" (who now worship at the church). In the 1970s and '80s Osborne had been the president of Black Rock and, as its attorney, had drafted most of its corporate

---

[1] This textual account paraphrases the arbitrators' report, which is reprinted in Petitioners' Appendix ("Pet. App.") at 28a - 44a.

documents. Its articles of incorporation adopted and recorded on 1978 established ten trustees, exclusive of the minister, who would serve four-year terms.

At a 1986 trustees meeting Osborne sought to have the church declared dissolved. His logic was that because its last "member" had died in 1972, it had then ceased to exist. Osborne's religious-based definition of "member" excluded those persons who engaged in "open communion," a definition eliminating all who were currently worshipping at Black Rock. The attending trustees voted down Osborne's proposal by a 6-to-3 margin. He then commenced a state court proceeding seeking dissolution, which also proved unsuccessful.

With Osborne, its president, claiming the church not in existence, in May 1987 its vice president (Welden) and secretary called a special meeting of the trustees to elect new church officers. Considering Black Rock not to have been dissolved, the trustees selected new officers and removed Osborne due to his attempts to undermine the church.

Also in May 1987, Osborne created a new corporation, petitioner AUB, and filed papers with the state merging it with an entity called the Trustees of Ebenezer Primitive or Old School Baptist Church of Baltimore, Inc. ("Ebenezer"), of which he claimed to be president. He then asserted that due to the demise of Black Rock, its assets had passed to Ebenezer. Accordingly, he claimed, with Ebenezer's merger with

AUB, Black Rock and its assets were now controlled by Osborne's AUB. The instant suit then followed.

The arbitrators, who were convened pursuant section 5-310 of the state's Religious Corporations Act [Pet. App. at 47a], found that Osborne, acting as president of Black Rock, had consistently for many years prior to 1986 recognized its existence. At no time had he claimed that Ebenezer had inherited its assets. At a time when he was now claiming that there had been no living church member, and therefore no church, Osborne had been busy drafting legal documents that recognized the existence of Black Rock. The arbitrators further found that persons continue to attend the church (although due to having open communion, they were not recognized by Osborne as "members").

Based on these factual findings, the arbitrators applied equitable principles and held that "Osborne by his various actions is estopped to deny the existence of Black Rock Church . . . ." [Pet. App. at 42a] Furthermore, it held that the trustees were entitled to call the June 1987 meeting due to Osborne's refusal to do so. Because Osborne's term by then had expired, the arbitrators held that there had been no need to remove him as president or as a trustee. Accordingly, the arbitrators affirmed the legal existence of Black Rock and recognized the "Welden group" to be its officers and trustees.

In their eventual appeal to the Court of Appeals, petitioners did not challenge the arbitrators' estoppel rulings, but rather limited their issues on the merits to the

propriety of the Welden group to call the June 1987 meeting and the existence of a quorum at that meeting. [Resp. App. *passim*]

Upon analyzing what was to be reviewed, the Court of Appeals began with petitioners' challenge to the June 1987 trustees meeting.[2] The Welden group asserted that because Osborne had failed in his duty to call an annual meeting, it had properly done so without him. Osborne's response was that because there was no longer a church, he had no duty to call a meeting. The Court of Appeals therefore saw itself as having to decide if Black Rock was "extinct." But that decision would require it to decide who constituted a "member" of the church. This, in turn, would require judicial resolution of whether membership excluded those who engaged in "open communion." The Court deemed it inappropriate under First Amendment constrictions for it to delve into this "theological thicket."

Second, the Court of Appeals noted, even if it were to find that the church had no valid member, it would have had to determine whether the "recognized practice of the denomination of Primitive Baptists" permitted Ebenezer to accede to Black Rock and, in turn, turn it over to AUB. It declined to enter into any "interpretation of religious custom and polity." It, accordingly, declined to review further the arbitrators' decision.

---

[2] A copy of the Court of Appeals' opinion is in Pet. App. at 1a - 16a.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Petitioners Have not Preserved for Review All Relevant Substantive Issues

Petitioners presented a streamlined argument to the Court of Appeals raising two basic issues, one procedural and one substantive. First, they argued that section 5-310 did not totally bar judicial review of arbitrators' decisions. [Resp. App. at 16a - 20a] The Court of Appeals agreed with petitioners on this point. Second, they argued that as a matter of corporate law the June 1987 meeting of the Black Rock trustees was invalidly noticed (only the president, and not the vice president could call such a meeting) and that no quorum existed, thus precluding any deliberative action by those trustees present. [Resp. App. at 23a - 29a]

Significantly omitted from petitioners' brief was any reference to the core finding of the arbitrators: that petitioner Osborne was estopped to challenge the actions of the remaining trustees and to claim transfer of Black Rock to Ebenezer and then AUB. Thus, petitioners now concede that AUB has no valid claim to Black Rock. This concession leaves little, if anything, of their case.

The brief is also devoid of any reference to the latter two issues on which certiorari is now sought. Petitioners did not suggest to the Court of Appeals that the Maryland Religious Corporations Act may be

unconstitutional (as is claimed in their Question Presented No. 2). Similarly, nowhere is found a claim that the failure to offer judicial review would deny petitioners due process of law (Question Presented No. 3).

Thus petitioners have only preserved their first Question Presented: whether the Court of Appeals' refusal to review the merits of the controversy conforms with First Amendment standards. As a comparison of the arbitrators' report and petitioners' brief in the Court of Appeals reveals, however, by only arguing to the Court of Appeals the notice and quorum issues, petitioners have conceded all substantive issues that underlay the arbitrators' decision. Thus, nothing is left of petitioners' case that could at this date bring them relief. A case in this mutilated posture should not lend itself to the issuance of a writ of certiorari.

II. The Nature of the Dispute Below Makes Certiorari Inappropriate

This case presents no doctrinal differences between each party and Maryland's highest court. The Court of Appeals and the parties all rely upon the same legal rules regarding when a court can resolve issues relating to a church. *Compare* Pet. at 10 & 12-15 *with* Court of Appeals Opinion [Pet. App. at 12a - 15a]. Thus, no legal clash exists.

Furthermore, petitioners have made no challenge to the Court of Appeals' holding that the First Amendment bars its resolution of those issues that it deemed necessary to decide in order to resolve

petitioners' appeal. Petitioners do not suggest that the Court should have decided who were Black Rock "members" and when the assets of an extinct church pass on to a sister church. Consequently, this case presents no claim that the Court of Appeals has misapplied the First Amendment case law to these issues. Petitioners admit as much. [Pet. at 11]

Instead, at the heart of the controversy in its present posture is a difference over which fact and state law issues are crucial to appellate resolution of the arbitrators' ruling. Petitioners claim that the core issues for appellate review are whether a trustees' meeting was commenced with proper notice and conducted with a quorum. To the Court of Appeals, however, a vastly different set of issues were necessarily presented. Thus, any review by this Court would merely concern an appraisal of whether the Court of Appeals properly dissected the factual and legal problems presented. Did it accurately list the issues that must be resolved to adjudicate the case on appeal? In essence, the appellate court ruled that the necessary issues were A and B, and that these required religious doctrinal inquiry. Petitioners, on the other hand, claim the issues to be C and D, which arguably do not require such inquiry. In essence, therefore, any review by this Court would turn on whether the issues are A and B (as the Court of Appeals held) or, rather, C and D (as petitioners contend). Respondents submit that this Court does not sit to second guess a state court's decision as to what issues are presented in a case adjudicated under state law. Accordingly, the judicial

function that petitioners seek to invoke from the Court is not one over which it should exercise its certiorari power.

III. Petitioners Pose a Mere Academic Question

Even if the Court were to grant certiorari and direct the Court of Appeals to conduct a review on the merits, in light of the issues already waived by petitioners and the stringent standard of review that petitioners acknowledge would apply, they would have no chance of success on the merits.

As has been explained, by failing to appeal the arbitrators' estoppel findings, petitioners have already conceded that AUB has no claim to Black Rock property. This being the case, petitioners seek no more than an advisory opinion as to Maryland corporate law concerning the calling of a trustee meeting and its required quorum.[3]

---

[3] The arbitrators upheld the propriety of someone other than the president calling a trustees' meeting. They had "no doubt that had the other trustees sought a writ of mandamus to compel [Osborne] to call the meeting," a court would have so ordered. [Pet. App. at 43a] As to the quorum issue, because by then Osborne's term had expired, the number of trustees was nine. Thus, five was a majority. Alternatively, respondents argued below that the term of another trustee had ended due to his poor health and incompetence. Under either ground, the arbitrators' holding that a quorum was present [Pet. App. at 36a] could not be called "clearly irrational," and subject to state court reversal.

Furthermore, as the Court of Appeals noted below, Maryland common law severely limits the standard for judicial review of an arbitration decision. An award can only be vacated for a "palpable mistake of law or fact . . . apparent on the face of the award" or for a "mistake so gross as to work manifest injustice." [Pet. App. at 9] Thus, a Maryland appellate court must give arbitration decisions--regardless of their religious context--extreme deference, almost to the point of nonreviewability. For all intents and purposes, this narrow standard would deny petitioners any further relief. Their present petition, therefore, poses but academic hopes against a foregone conclusion. A case in this anemic state does not qualify for certiorari relief.

CONCLUSION

For the several reasons set forth above, nothing presented in this petition comes within the scope of

Supreme Court Rule 10.1. The petition for a writ of certiorari should be denied.

Respectfully submitted,

C. William Clark
Ruppersberger, Clark & Mister
30 E. Padonia Road
Suite 404
Timonium, Maryland 21093
(410) 561-3000

C. Christopher Brown*
Brown, Goldstein, & Levy
520 W. Fayette Street
Suite 300
Baltimore, Maryland 21201
(410) 659-0717

Counsel for Respondents

*Counsel of Record

In The
COURT OF APPEALS

September Term, 1993

No. 154

THE AMERICAN UNION
OF BAPTISTS, INC., *et al*,

Appellants,

v.

THE TRUSTEES OF THE PARTICULAR
PRIMITIVE BAPTIST
CHURCH AT BLACK ROCK, INC., *et al*,

Appellees.

Certiorari to the Court
of Special Appeals

BRIEF FOR APPELLANTS

JAMES L. OTWAY
ANTHENELLI & OTWAY
Attorneys for Appellants
108 East Market Street
Salisbury, MD 21801
(410) 749-3900

TABLE OF CONTENTS

Page

Table of Citations ii

Statement of the Case 1

Statement of Questions Presented 2

Statement of Facts 3

Argument 9

Conclusion 28

Appendix (Opinion of Court of Special Appeals) 31

Text of Statements and Rules Cited 40

TABLE OF CITATIONS

CASES

Page

Attorney General of Maryland, et al. v. James Johnson, et al, 282 Md. 274, 385 A.2d 57 (1978) 19

Board of Education of Prince George's County v. Prince George's County Educators' Association, Inc., 309 Md. 85, 522 A.2d 931 (1987) 18, 21

Hebert, et al. v. Stansbury, et al. 351 So.2d 253 (1977), cert. denied, 353 So.2d 1335 (1978) 23

LeBlanc v. Davis, 432 So.2d 239 (La., 1983)14

Lozanoski v. Sarafin, 485 N.E.2d 669 (Ind. App., 3rd Dist., 1985) 14

Maryland and Virginia Eldership of the Churches of God v. The Church of God at Sharpsburg, Inc., 254 Md. 162, 254 A.2d 162 (1969) 11

McCormick Const. Co. v. 9690 Rd. Ltd. Pship, 79 Md. App. 177, 556 A.2d 292 (1989) 16

Organization for Preserving the Constitution of Zion Lutheran Church of Auburn, Washington v. Mason, et al., 743 P.2d 848, 49 Wash. App. 441 (1987) 14

O.S. Corporation v. Samuel A. Kroll, Inc., 29 Md. App. 406, 348 A.2d 87 (1975) 20

Parr Construction Co. v. Pomar, 217 Md. 539, 144 A.2d 69 (1958) 18

Polen v. Cox, ,259 Md. 25, 267 A.2d 201 (1970) 14

Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969) 11

Smith, et al. v. Erb, et al., 4 Gill 343 (1846) 22

Smith v. Riley, et al., 424 So.2d 1166 (La. App., 1982) 14

Southern Maryland Hospital Center
v. Edward M. Crough, Inc.,
48 Md. App. 401,
427 A.2d 1051 (1981) 21

Valerino v. Little, 62 Md. App. 588,
490 A.2d 756 (1985) 23

Wilkerson v. Baptists, et al.,
393 So.2d 195 (La. App., 1980) 13

STATUTES

Maryland Code Annotated,
Article 25, §45 16

Maryland Code Annotated,
Article 48A, §541(c) 17

Maryland Corporations and Associations
Code Annotated, §1-102 12

Maryland Corporations and Associations
Code Annotated, §2-408 ..... 12, 24

Maryland Corporations and Associations
Code Annotated, §2-409 ..... 12, 23

Maryland Corporations and Associations
Code Annotated, §5-310 ..... 2, 15, 16, 17

Maryland Courts and Judicial
Proceedings Code §3-201 17

Maryland Courts and Judicial
Proceedings Code
Annotated §3-215 7

Maryland Courts and Judicial
Proceedings Code
Annotated §3-224 ..... 17, 19

Maryland Estates and Trusts Code,
Annotated, §5-304 17

Maryland Labor and Employment Code,
Annotated, §4-109(b) 16

Maryland Transportation Code,
Annotated, §6-402(b) 17

Maryland Transportation Code,
Annotated, §7-602(b) 17

CONSTITUTIONAL PROVISIONS AND MARYLAND RULES INVOLVED

Maryland Rule E-2 ..... 18, 19

Constitution of Maryland, Declaration of
Rights, Article 24 ..... 18, 19

Constitution of Maryland, Declaration of Rights, Article 19 19

United States Constitution, Fourteenth Amendment 18

Treatises

5 Fletcher, W., encyclopedia of Corporations, Section 1997 (Perm Ed) 23

STATEMENT OF THE CASE

This is an appeal from an Order of the Circuit Court for Wicomico County granting Appellee's Motion for Summary Judgment and denying Appellant's Motion to Vacate The Award Of The Panel Of Arbitrators appointed to determine who were the legitimate Trustees of the Particular Primitive Baptist Church at Black Rock, Inc. (hereinafter referred to as "Black Rock").

Appellant, the American Union of Baptists, Inc. (hereinafter referred to as "AUB") is a Maryland religious corporation incorporated in 1987 and located in Salisbury, Wicomico County, Maryland. Appellee, the Trustees of the Particular Primitive Baptist Church at Black Rock, Inc. is a Maryland religious corporation located in Butler, Baltimore County, Maryland.

The conflict between the parties arises out of a Special Meeting of the Trustees Black Rock called by its Secretary and Vice President and held on June 13, 1987 at the Black Rock Church for the purpose of electing officers. Appellants contended that the meeting was not properly noticed, lacked the majority vote required to take action and, consequently, the ouster of certain Trustees and election of new officers attempted at that meeting was invalid. Appellees contend to the contrary. Thus, the two groups each claim that the power to control the temporal matters of Black Rock is solely and properly vested in them.

On July 12, 1988 Appellees filed suit in the Circuit Court for Wicomico County seeking declaratory and injunctive relief; requesting a declaration of which group was the legitimate trustees of the Black Rock Church and an injunction to enjoin the transfer of church property. Thereafter, Appellants filed a Motion to Compel Arbitration pursuant to Maryland Corporations and Associations Code, §5-310. Pursuant to Section 310, each side appointed an arbitrator. However, they were unable to agree upon a third. As a result thereof, the Court appointed the third arbitrator. Arbitration was conducted and the decision of the majority of the arbitrators was that the removal of certain Trustees and the election of new officers at the meeting of June 13, 1987 was valid. Appellants moved to vacate the award, which relief was denied.

An appeal was noted by the Appellant to the Court of Special Appeals and that Court affirmed the judgment below. The American Union of Baptists, Inc., et al. v. The Trustees of the Particular Baptist Church at Black Rock, et al., 98 Md. App. 11 (1993).

Appellant's petition to this Court for issuance of its Writ of Certiorari was granted on January 28, 1994.

STATEMENT OF QUESTIONS PRESENTED

I. IS AN ARBITRATOR'S DECISION ON THE VALIDITY OF A CONTESTED CHURCH ELECTION MADE PURSUANT TO CA §5-310 SUBJECT TO JUDICIAL REVIEW?

II. WAS THE UNDERLYING DECISION OF THE ARBITRATORS COMPLETELY IRRATIONAL OR PALPABLY MISTAKEN ON ITS FACE.

STATEMENT OF FACTS

I.

The Trustees of the Particular Primitive Baptist Church at Black Rock, Inc. became incorporated in 1891 (E-15). In 1987 Articles Of Amendment and Restatement of the Articles of Incorporation of Black Rock were filed with and approved by the State Department of Assessments and Taxation (E-21).

The Restated Articles provided for election of 10 Trustees in addition to a minister trustee. Election was by the individuals who, according to custom and rules of order of the church, have a voice in the management of the spiritual and ecclesiastic affairs. Each trustee served a four (4) year term and automatically stood for re-election to additional terms until death, resignation, incapacity or removal pursuant to or by operation of law (E-22).

In the event of a vacancy, the remaining trustees were permitted to fill same by majority vote or, alternatively, adopt a resolution for a special election by the congregation. In the event any election was not fully consummated the trustees then serving held over until an election and seating of trustees was completed (E-22). At all meetings of the Board of Trustees the majority of its members then serving constituted a quorum (E-23).

The By-Laws of the corporation provided for election by the trustees of four (4) officers; president, vice-president, secretary and treasurer, whose duties are set forth therein. Officers were required to be elected at the trustees' annual meeting for four (4) year terms with the first election to be held at the annual meeting in 1979. Vacancies in an office were to be filled by the trustees at the next annual meeting (E-46).

The president was vested with the sole authority to call meetings necessary to transact church business. (E-46).

At the first annual meeting after the Amendment and Restatement of the Articles of Incorporation, Eugene F. Osborne, Sr., George R. Welden, Luwanda D. Viers and Melvin Gladding were elected as President, Vice-President, Secretary and Treasurer, respectively. Additional Trustees elected at that time were John B. Ensor, Melvin B. Gladding, Quincy Gladding, Eugene F. Osborne, Sr., Emma Parker, Carl H. Viers, Luwanda D. Viers, J. Russell Welden and George R. Welden (E-5).

At the annual meeting of May 3, 1981 Lucille Acres, Virginia W. Gladding and Gail Thompson were elected as members of the Board of Trustees (E-55). The next scheduled election of trustees occurred on May 1, 1983 at the annual meeting of Black Rock, at which time the aforementioned trustees were re-elected to a second four year term, as were the aforementioned officers (E-59).

The aforementioned trustees continued in office with the exception of the minister, Elder John D. Wood, who had died in 1985. The last remaining member of the church, Mrs. Gillespie, had died in April of 1972 (E-49). With the death of the minister and the last remaining member of the church, the President, Eugene F. Osborne, called a special meeting of the trustees for December 8, 1986 to present a motion to dissolve the corporation, which motion failed (E-65). Thereafter, Eugene F. Osborne, Melvin Gladding, and Virginia Gladding, as minority trustees, filed an action in the Circuit Court for Baltimore County, for involuntary dissolution. That petition was dismissed and such dismissal was affirmed by this court in unreported opinion no. 748 of the September term, 1987.

On May 27, 1987, George R. Welden, Vice President of the trustees of Black Rock and Luwanda D. Viers, Secretary, sent notice to the trustees of a special meeting of the trustees of Black Rock to be held on June 13, 1987 for the purpose of election of officers. (E-66). On June 4, 1987, prior to the scheduled meeting, Eugene F. Osborne, Sr., President of the trustees, sent notice to

all other trustees indicating that the Secretary and Vice President of Black Rock did not have the authority to call any meeting necessary to transact church and cemetery business. In that notice he indicated that the scheduled meeting was invalid and of no effect and that any actions taken would not be honored as binding upon Black Rock (E-72).

The meeting went ahead as scheduled and the five trustees present were George Welden, Luwanda Viers, Russell Welden, Gail Thompson, and Carl Viers. The five trustees absent were Eugene F. Osborne, Sr., Melvin Gladding, Virginia Gladding, Lucille Akers, and John D. Ensor. At the aforementioned meeting, the five trustees voted unanimously to remove Eugene F. Osborne from the office of President and from his office as trustee. In addition, a motion was also passed to remove Melvin and Virginia Gladding from the board of trustees. Officers elected at that time were George Welden, President; Luwanda Viers, Vice President; Russell Welden, Treasurer; and Gail Thompson, Secretary (E-69).

At this time, there existed a Baltimore Association of Baptist Churches, which had been in existence since at least the 1920's. The subject church, Black Rock, was a member of that association, as was the Ebenezer Primitive or Old School Baptist Church of Baltimore City (hereinafter referred to as "Ebenezer"). Ebenezer contended that with the extinction of the Black Rock Church as a result of the death of its last member in 1972, that pursuant to and consistent with recognized practice of the denomination of the Primitive Baptists, the control

of Black Rock became vested solely in Ebenezer (E-92). On July 23, 1987, the trustees of Ebenezer Primitive or Old School Baptist Church of Baltimore City, Inc. merged into the American Union of Baptists, Inc. pursuant to Articles of Merger, filed with and approved with the State Department of Assessments and Taxation on the aforementioned date. (E-92). On April 16, 1988, the annual meeting of the American Union of Baptists, Inc. was held in Salisbury, Maryland, at which time a resolution was presented to the trustees of AUB to exercise its authority to elect individuals to serve as trustees of Black Rock. That resolution was unanimously adopted and new trustees were elected (E-93). Those trustees were Milton Fountain, Victor H. Laws, Eugene F. Osborne, Jenny E. Osborne, and Burnell B. Williams (E-93). On the same date, the newly elected trustees of Black Rock passed a resolution merging Black Rock into the American Union of Baptists (E-93).

On July 12, 1988, Appellees filed the aforementioned Complaint for Declaratory Judgment And Injunctive Relief in the Circuit Court for Wicomico County. Demand for arbitration was filed by Appellants and arbitration was had. The majority award of the arbitration panel found that the 1978 Articles of Amendment and Restatement of Articles of Incorporation of Black Rock were valid. The panel found that in 1987, prior to the June 13th meeting, the ten existing and valid trustees were Eugene F. Osborne, President; George R. Welden, Vice President; Luwanda D. Viers, Secretary; Melvin B. Gladding, Treasurer; Lucille Acres, John V. Ensor, Virginia W. Gladding, Gail Thompson, Carl H.

Viers, and Russell Welden (Elder John D. Wood having died in 1985) (E-102). The panel went on the find that the five trustees present at the June 13, 1987 meeting were George Welden, Luwanda Viers, Russell Welden, Gail Thompson, and Carl Viers. The panel found this to be a majority of the board (E-108).

In addition to the aforementioned, the panel, in its opinion, noted that the President was the officer responsible for calling meetings necessary to transact church and cemetery business (E-114). However, the panel also noted in its opinion that the notice of the special meeting of June 13, 1987, given May 27, 1987, was issued by the Vice President and Secretary of the corporation (E-114). The panel was of the opinion that had the trustees sought a Writ of Mandamus to compel the President, Eugene Osborne, to call a meeting, that a court would have issued such an Order. Accordingly, the panel found the meeting of July 13, 1987 to have been validly called and that the action taken therein was also valid (E-115).

In conclusion, the panel found that the officers of Black Rock were President, George Welden; Vice President, Luwanda Viers; Treasurer, Russell Welden; Secretary, Gail Thompson, and that the Trustees of the corporation were George Welden, Luwanda Viers, Russell Welden, Gail Thompson, Carl Viers and Emma Parker (E-115).

ARGUMENT

THE COURT OF SPECIAL APPEALS ERRONEOUSLY HELD THAT THERE IS NO RIGHT OF JUDICIAL REVIEW OF THE DECISION OF ARBITRATORS MADE PURSUANT TO CORPORATIONS AND ASSOCIATIONS, §5-310.

In its opinion the Court of Special Appeals held that judicial review of the decision of arbitrators under Corporations and Associations, §5-310 is precluded by the First Amendment to the United States Constitution as it would "inevitably" involve an unconstitutional intrusion into matters of religious doctrine. Additionally the Court of Special Appeals held that the legislature in enacting Corporations and Associations, §5-310 and its predecessors intended to remove from the courts the issues of church polity that "inevitably" arise in disputed church elections and, accordingly, Corporations and Associations, §5-310's description of the arbitrators award as "final" carries a different meaning than in other contexts. In each of these conclusions the Court of Special Appeals has erroneously determined that the resolution of a disputed church election would "inevitably" require consideration of issues of church polity. To the contrary, this dispute only requires the application of the neutral principles of the Maryland Religious Corporation Law and the provisions of Articles of Incorporation and By-Laws of Black Rock.

A. RESOLUTION OF THE ISSUES PRESENTED DOES NOT INVOLVE CONSIDERATION OR DETERMINATION OF RELIGIOUS DOCTRINE, BUT SIMPLY THE APPLICATION OF NEUTRAL PRINCIPLES OF LAW.

The dispute before this court centers around the validity of an election and ouster of officers attempted at a special meeting of the Trustees of Black Rock on June 13, 1987. The election and action taken at that meeting were invalid due to improper notice and the absence of both a quorum and a majority vote. Determination of legality of the action only requires the application of corporate law and the mandates of Black Rock's Articles of Incorporation and By-laws. It in no way requires consideration or determination of religious doctrine.

There is not an absolute prohibition against civil courts adjudicating disputes between members of religious organizations which involve issues of property, leadership or other matters. However, judicial intervention into ecclesiastical matters is proscribed by the First Amendment. The permissible boundaries of judicial review are set forth in the Supreme Court decision in Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed.2d 658 (1960) which provided:

> It is obvious, however, that not every civil court decision as to property claimed by a religious organization jeopardizes values

protected by the First Amendment. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which an be applied without 'establishing' churches to which property is awarded. But First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. * * * the Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine." (Emphasis supplied.) (393 U.S. at 449, 89 S.Ct. at 606, 21 L.Ed.2d at 665)

The "neutral principles of law" standard was applied by the Court of Appeals in The Maryland and Virginia Eldership of the Churches of God v. The Church of God at Sharpsburg, Inc., 254 Md. 162, 254 A.2d 169 (1969). In Sharpsburg the Court held judicial review to be appropriate when resolution of the issues only required

application of Maryland religious corporation law and the mandates of the church's corporate charter. The court noted:

> The Maryland Religious Corporation Law is a general law for all religious corporations and has no reference to doctrine. It, therefore, meets the requirements of a 'neutral principle of law'. 254 Md. 168, 254 A.2d 168

In the instant case the court is not called upon to determine religious principles or doctrine, a persons adherence to same or any question regarding religious practice. The court is quite simply asked to determine whether the notice of the special meeting given by the then Vice President violated Maryland Corporations and Associations Code §2-409(b)(1); whether the attempt to conduct valid corporate business in the absence of a quorum or majority vote was impermissible under Maryland Corporations and Associations Code 2-408(a) and (b)[1] and whether each of these acts also violated the charter and By-laws of Black Rock. Resolution of these issues does not involve or require consideration of religious doctrine. As in Sharpsburg, only Maryland general and religious corporate law and the Charter and By-laws of the religious corporation need be considered.

---

[1] The provisions of Maryland General Corporation law are applicable to religious corporations under Maryland Corporations and Associations Code §1-102.

Courts of other jurisdictions which have examined the propriety of judicial review of the validity of church elections in light of the First Amendment have also found such review to be permissible. The reasoning of the Court of Appeals of Louisiana in Wilderson v. Baptists, et al., 393 So.2d 195 (La.App., 1980) is persuasive.

> The trial court's finding that the election of members to a board of directors of a nonprofit religious corporation is an ecclesiastical matter not subject to the jurisdiction of the civil courts of this state must be reversed. It is true that the United States Constitution and the Louisiana Constitution, as interpreted by our courts, prohibit civil courts from interfering in the ecclesiastical matters of a religious group. These are matters concerning religious discipline, faith, rule, custom or law which have constitutionally been left for the religious bodies themselves to decide. However, when a nonprofit religious corporation has established itself by a charter and has provided in the charter the time and method of electing its board of directors, the issue as to whether or not the board of directors has been validly elected according to the charter is a question cognizable by the civil courts of this state. The procedural niceties attending the election of a board of directors for a nonprofit religious corporation have nothing

> to do with religious law, custom or policy and are not ecclesiastical matters within the exclusive domain of a particular religious group. A church member who claims that the board of directors was not elected according to the procedure set forth in the charter has a right to have his claim heard by a civil court in this state. 393 So.2d at 197 (citations omitted).

See also, Organization for Preserving the Constitution of Zion Lutheran Church of Auburn, Washington v. Mason, et al., 743 P.2d 848, 49 Wash. App. 441 (1987); Lozanoski v. Sarafin, 485 N.E.2d 669 (Ind. App., 3rd Dist., 1985); LeBlanc v. Davis, 432 So.2d 239 (La., 1983); Smith v. Riley, et al., 424 So.2d 1166 (La. App., 1982).

Appellant submits that the Court of Special Appeals erroneously focused upon the source of the controversy in reaching its conclusion that issues arising out of contested elections "inevitably" involve considerations of religious polity. The proper focus of the court's review is not the source of the controversy, which may well indeed involve issues of religious polity; but rather whether the resolution of the dispute will require the court to decide ecclesiastical issues. This Court's holding in Polen v. Cox, 259 Md. 25, 267 A.2d 201 (1970) clearly emphasizes the distinction:

> The legal standard which the chancellor adopted to determine that the court had no jurisdiction to intervene in this dispute is

founded upon an erroneous interpretation of the Presbyterian and Sharpsburg cases. These cases do not hold that the source of the controversy – that is whether the property dispute is motivated by a controversy over doctrinal practices – is determinative of whether the civil courts can intervene to decide church property disputes. To so hold would too narrowly restrict the scope of the court's jurisdiction. The relevant inquiry must be whether the court can resolve the property dispute on the basis of neutral principles of law which do not involve the resolution by the court of ecclesiastical issues. Thus in the present case, it does seem that the underlying source of the controversy stems from the mother church's assignment of clergy to the position of overseer and the decision to abolish the bifurcated church structure. However, as long as the court does not have to resolve the doctrinal propriety of these changes in order to determine who has legal control of the property, there is no unconstitutional intervention by the state in church affairs . . . 259 Md. 30, 267 A.2d 201.

It is apparent from the above that resolution of the issues arising out of this disputed election will only involve questions of corporate law and that consequently, there is no constitutional bar to judicial review of the validity of the arbitrators determination.

B. THE USE OF THE WORD "FINAL" IN MARYLAND CORPORATIONS AND ASSOCIATIONS CODE §5-310 DOES NOT PRECLUDE JUDICIAL REVIEW OF THE ARBITRATOR'S AWARD.

In its opinion, the Court of Special Appeals held that the legislature intended the word "final" to have a different meaning in Corporations and Associations, §5-310 than in other statutory provisions as it determined that all contested church elections "inevitably" involve a determination of issues of religious polity. For the reasons stated above in Section (A) Appellant submits that such a conclusion is erroneous. Moreover, other statutory provisions and rules of statutory construction compel the conclusion that arbitration awards under Corporations and Associations, §5-310 are subject to judicial review.

"Generally, Maryland law does not permit appeals unless and until the trial court has rendered a final judgment." McCormick Const. Co. v. 9690 Deerco Rd. Limited Partnership, 79 Md. App. 177, 180 556 A.2d 292, 295 (1989). Therefore, the status of the award as "final" is a logical and necessary prerequisite to judicial review.

Further, had the legislature intended awards made under Maryland Corporations and Associations Code §5-310 to be binding and conclusive on the parties, they would have chosen language which evidenced such intent.

The Annotated Code of Maryland contains numerous other provisions regarding arbitration. In each of those where the legislature intended no right of review of an arbitrator's award they expressed such intent in clear and uncertain terms. See, Maryland Code, Article 25, §45 ("The award and determination of the arbitrators or umpire shall be binding and conclusive in the matter submitted"); Maryland Labor and Employment Code §4-109(b) ("A determination and award of a board is final and binds the disputants"); Maryland Transportation Code, §6-402(b) (. . . the decision of that arbitrator if final and binding on both parties); Maryland Transportation Code, §7-602(d) ("A majority determination of the board is final and binding on all disputed matters"). See also, Maryland Estates and Trusts Code, §5-304 and Maryland Code, Article 48A, §541(c).

In addition to the aforegoing, a right of review is available to Appellant under the common law or under the provisions of Courts and Judicial Proceedings Article, §3-224 (Uniform Arbitration Act) and Rule E-2.

The trial court appointed the third arbitrator in this case and referred this matter to arbitration pursuant to the provisions of Maryland Corporations and Associations Code §3-201, et seq. The latter sections

include the provisions of the Uniform Arbitration Act as adopted in Maryland. The Act, at §3-215(a), provides:

> The majority of the arbitrators may determine any question and render a final award (emphasis supplied).

A "final award" under the Uniform Act is subject to being vacated under the provisions of Maryland Courts and Judicial Proceedings Code §3-224. Assuming, arguendo, that the Uniform Act were not applicable, the post award provisions of that Act for vacating the award would still be applicable under the provisions of Maryland Rule E-2 which provides:

> After a final award has been made in writing in an arbitration to which the Maryland Uniform Arbitration Act is inapplicable, court proceedings may be had to confirm, vacate, modify, correct, or enter judgment on the award. In any such case, the revisions of the Maryland Uniform Arbitration Act concerning such proceedings shall be applicable (emphasis supplied).

Prior to the adoption of the Uniform Act and its provisions regarding the review of arbitration awards, the common law provided a similar remedy to a party aggrieved by the arbitrator's decision. The award of an arbitration panel is subject to judicial review and may be vacated under the common-law for any error apparent on

the face of the arbitration award or for a mistake so gross as to work manifest injustice. Board of Education of Prince George's County v. Prince George's County Educators' Association, Inc., 309 Md. 85, 522 A.2d 931 (1987); Parr Construction Co. v. Pomar, 217 Md. 539, 144 A.2d 69 (1958).

Finally, the denial of judicial review of an arbitration award under Corporations and Associations, §5-310 would be a denial of equal protection under the Fourteenth Amendment of the United States Constitution and of the due process clause of Article 24 of the Maryland Declaration of Rights to parties which are compelled to arbitrate a contested church election.

Assuming there is no first amendment bar to judicial review, a party to a disputed church election must have a right of access to the courts under Article 9 of the Declaration of Rights of the Maryland Constitution. While the legislature may subject the exercise of that right to reasonable regulation and impose arbitration as a pre-condition, it cannot completely deny the litigant access to the courts. Attorney General of Maryland, et al. v. James Johnson, et al., 282 Md. 274, 385 A.2d 57 (1978).

Judicial Review is not precluded by the First Amendment to the United States Constitution or the language of Corporations and Associations, §5-310. The right of judicial review is supported by the common law right of review of arbitration awards, Corporations and

Associations, §3-224, Maryland Rule E-2, principles of statutory construction and by Articles 19 and 24 of the Declaration of Rights of the Maryland Constitution.

II. THE DECISION OF THE ARBITRATORS WAS COMPLETELY IRRATIONAL AND PALPABLY MISTAKEN ON ITS FACE.

Standard of Review

The statutory standard of review of an award of an arbitration panel is set forth in Courts and Judicial Proceedings Article, Title 3, Section 224(b) which provides as follows:

> (b) Grounds. - The court shall vacate an award if:
>
> (1) An award was procured by corruption, fraud, or other undue means;
>
> (2) There was evident partiality by an arbitrator appointed as a neutral, corruption in any arbitrator, or misconduct prejudicing the rights of any party;
>
> (3) The arbitrators exceeded their powers;
>
> (4) The arbitrators refused to postpone the hearing upon sufficient cause

> being shown for the postponement, refused to hear evidence material to the controversy, or otherwise so conducted the hearing, contrary to the provisions of Section 3-213 as to prejudice substantially the rights of any party; or
>
> (5) There was no arbitration agreement as described in Section 3-206, the issue was not adversely determined in proceedings under Section 3-208, and the party did not participate in the arbitration hearing without raising the objection.

An award procured by undue means or issued in excess of the arbitrator's powers has been equated by the Court of Special Appeals with an award which is without any rational basis. In O-S Corporation v. Samuel A. Kroll, Inc., 29 Md. App. 406, 348 A.2d 870 (1975) that court held that an award of an arbitrator is subject to judicial review if it is completely irrational. In describing this rule of review, the court held:

> [W]hen reviewing the fruits of an arbitrator's award, a judge may withhold only such as were tainted by improbity or based on a completely irrational

> interpretation of the contract. We recognize the very limited extension of the reviewing court's scope of review to include authority to vacate an award that is 'completely irrational'. Statutory support for this is found not only in the fact that he arbitrators 'exceeded their powers' when they reach a completely irrational result, but also in the connotation of the words 'undue means' in Section 3-224(b)(1). An award that is completely irrational is inferentially opprobrious, i.e., '[e]xpressing or carrying a sense of disgrace of contemptuous scorn' causing it to be suspect in its conception (footnote omitted). Id at 408-09, 348 A.2d at 874;

See also, Southern Maryland Hospital Center v. Edward M. Crough, Inc., 48 Md. App. 401, 427 A.2d 1051 (1981).

The common law standard of review is essentially the same. That is, an arbitration award is subject to being vacated for a "palpable mistake of law or fact apparent on the face of the award or for a mistake so gross as to work manifest injustice. Board of Education of Prince George's County, supra at 105.

Under either standard of review the finding of the arbitrators should be vacated.

THE FINDING OF THE ARBITRATORS THAT NOTICE OF THE SPECIAL MEETING WAS PROPERTY GIVEN WAS COMPLETELY IRRATIONAL AND PALPABLY MISTAKEN ON ITS FACE.

The By-Laws of Black Rock, which were introduced into evidence at the arbitration of this matter, delineate the authority of each of the officers of the corporation. Section 2.1, relative to the president of the corporation, provides that the president "shall appoint necessary committees, fill office vacancies arising from death or resignation, and call such meetings as are necessary to transact church and cemetery business." (emphasis supplied). It is undisputed in this case that the meeting of June 13, 1987 was not called by the President but rather was called by the Vice President and Secretary. Indeed, upon receipt of notice of the meeting, the President, Eugene Osborne, directed communication to all other trustees prior to that meeting that such others were without authority to call same. The law in this jurisdiction and in others is that where the By-Laws authorize a particular officer to call a special meeting, only that officer may validly call same.

In Smith, et al v. Erb, et al, 4 Gill 343 (1846), the court was called upon to resolve a similar dispute between factions of the German Evangelical Reformed Church in the City of Baltimore. The charter of the church provided that all meetings of the elders and trustees be called by the president, who was the minister of the church. At the time of election, two different groups called the meetings and held elections. In that case, the court held that the

election called by one other than the President was invalid, as it was not in conformity with the provisions of the charter of the corporation which required the meeting to be called by the President. See also, Valerino v. Little, 62 Md. App. 588, 490 A.2d 756 (1985), Hebert, et al v. Stansbury, et al, 351 S.2d 253 (1977); 5 Fletcher Encyclopedia of Corporations, Page 15, Section 1997, (Perm Ed).

In addition to the foregoing Maryland case law, Maryland corporate statutory law is also in accord. Maryland Corporation and Associations Code, §2-409(b)(1) provides that notice of each meeting of the Board of Directors shall be given as provided in the By-Laws. It is beyond dispute, therefore, that the meeting of June 13, 1987, called by the Vice President and Secretary, was invalid and improper. It logically and legally flows therefrom that no proper or valid action can be taken at such a meeting.

The majority opinion of the arbitration panel at page 4 clearly recognizes that the authority to call meetings is vested solely in the President. The opinion also acknowledges that notice of the special meeting of June 13, 1987 was given, not by the President; but by the Vice President and Secretary of the corporation. Despite these findings, the arbitrators concluded that the meeting of June 13, 1987 was a valid meeting. This conclusion is internally inconsistent, contrary to the By-Laws of the corporation, and contrary to Maryland law. On its face, therefore, the award of the panel is completely irrational and mistaken. As such, the finding of the panel of

arbitrators that the meeting of June 13, 1987 was valid and that the officers and trustees elected therein legitimately hold office, must be vacated.

THE FINDING OF THE ARBITRATORS THAT FIVE (5) CONSTITUTES A MAJORITY OF TEN (10) WAS COMPLETELY IRRATIONAL AND PALPABLY MISTAKEN ON ITS FACE.

The majority opinion of the arbitrators found that there were ten (10) validly serving trustees at the time of the June 13, 1987 meeting of trustees and that the presence of five of those trustees constituted a majority and quorum. This finding was the basis for the arbitrators' conclusion that the action taken at the meeting was valid. Such a conclusion is contrary to Maryland statutory law, the charter and By-Laws of Black Rock and the most elementary principles of mathematics.

Maryland Corporations and Associations Code, §2-408 provides in pertinent part as follows:

> (a) Majority Rule - Unless this article or the charter or by-laws of the corporation require greater proportion, the action of a majority of the directors present at a meeting at which a quorum is present is the action of the board of directors.
> (b) Quorum - (1) Unless the by-laws of the corporation provide otherwise, a majority of the entire board of directors constitutes a quorum for the transaction of business.

The charter of Black Rock found by the majority opinion to be valid is its 1978 restated charter. Articles II and III contain the following provisions concerning its trustees or directors:

> Article II.
>
> The secular affairs of the corporation shall be governed by a board of trustees, who shall have perpetual existence and who shall exercise all corporate powers ...
>
> The number of trustees shall be ten (10) exclusive of the minister of the church, said minister being a trustee as a requirement of law;...
>
> Article III.
>
> The trustees shall be elected and their successors continued at a meeting of the congregation assembled in the church building at a date preceding the annual meeting of the board of trustees by the individuals who, according to custom and rules of order of the church, have a voice in the management of spiritual and ecclesiastic affairs. Each trustee shall serve gratuitously for a regular term of four years and shall automatically stand for re-election to additional terms until resignation, death, incapacity or removal pursuant to or by operation of law. In the event a vacancy

occurs the remaining trustees may fill said vacancy by majority vote or alternatively the remaining trustees may adopt a resolution for a special election by the congregation.

In the event that any election is not fully consummated, the trustees, then serving shall hold over until an election and seating of trustees is completed.

The By-Laws of Black Rock contain provisions which are consistent with the aforementioned statute and with the 1978 amended Articles of Incorporation. Those provisions are as follows:

Section 1. Trustees.

The number of trustees shall be at least four (4) exclusive of the minister, however the church by two-thirds affirmative vote may designate and elect a larger number of trustees. The trustees are elected to serve a regular term of four years. In the interim, between regular elections by the church, if a vacancy occurs the trustees then serving may fill said vacancy by majority vote or, alternatively, the remaining trustees may adopt a resolution for a special election by the church.

***

Section 2. Officers.

Officers shall be elected at the trustees' annual meeting for regular four (4) year terms starting in 1979. If a vacancy occurs, the trustees shall hold a special election to fill the vacancy at the following annual meeting.

Section 5.

A simple majority of the trustees then serving shall constitute a quorum for official action.

The majority opinion of the arbitrators at page 5 noted the following eleven persons to have been the trustees elected for the 1983 - 1987 term: Eugene F. Osborne, President; George R. Welden, Vice President; Lawanda D. Veers, Secretary; Melvin B. Gladding, Treasurer; Elder John D. Wood, Lucille Acres, John B. Ensor, Virginia W. Gladding, Gail Thompson, Carl H. Veers, and Russell Welden. Elder John D. Wood died in 1985 and there remained in 1985 ten trustees. The majority opinion at page 11 noted that the following five trustees were present at the June 13, 1987 meeting of trustees: George Welden, Lawanda Veers, Russell Welden, Gail Thompson, and Carl Veers. The panel considered these five of the remaining ten trustees to be a majority. This conclusion is completely irrational as a majority of the the trustees then serving had to be greater than five.

The By-laws of the corporation provide that the majority of the trustees then serving constitute a quorum for official action. Absent the existence of that quorum, no official action may be taken. It requires no citation of authority to determine that a majority means greater than one-half, or in this instance, greater than five of the then serving ten trustees.

It is readily apparent from the aforegoing that the trustees could only act when a majority of their body united in concert on a particular issue. In the meeting of June 13, 1987 those trustees present did not constitute a majority of the trustees then serving and their actions of removal of trustees and election of new officers were invalid. The conclusion of the arbitration panel to the contrary is palpably mistaken on its face and completely irrational, as it is not rational to conclude that five constitutes a majority of ten.

CONCLUSION

It is constitutionally permissible for courts to decide disputes involving religious organizations if they can do so by the application of "neutral principles of law." The Maryland General and Religious Corporation Laws are such neutral principles.

Disputes regarding church elections do not inevitably or of necessity involve issues of religious polity and in this specific case a determination of the issues

before the court only requires application of the requirements of corporate law and the charter and By-laws of Black Rock.

Judicial Review of Arbitration Awards specifically provided for under the Uniform Arbitration Act, Maryland Rule E-2 and the Common Law and there is nothing in Corporations and Associations, §5-310 or other statutes which would indicate a legislative intent to preclude review of awards under Corporations and Associations, §5-310.

In order to vacate the award of the arbitrators it must be shown that the arbitrators exceeded their powers by rendering an award which was clearly irrational or palpably mistaken on its face. That burden has been satisfied in this case in two apparent areas. First, the By-Laws of the corporation vest solely in the President the right to call meetings of the trustees to conduct the business of the church. In this instance, the majority opinion of the arbitrators clearly recognized that provision of the By-Laws and noted on two separate occasions that the meeting of June 13, 1987 was called, not by the President, but by the Secretary and Vice President. Despite the clear and undisputed deviation from the mandate of the By-Laws, the panel found the meeting of June 13, 1987 to have been validly called. There is no rational way to sustain such a conclusion.

Second, the By-Laws of the corporation which the arbitrators found to be valid, clearly state that a majority of the trustees then serving constitutes a quorum for

official action. The majority opinion of the arbitrators found that there were ten trustees then serving on June 13, 1987 and than only five of the those trustees were present at the meeting on that date. The panel found those five to constitute a majority of ten. Such evident miscalculation is clearly mistaken.

Based upon the arguments presented above, the failure to vacate the award of the arbitration panel was in error. Appellants' request that the decision of the trial court denying their petition to vacate the arbitration award be reversed, that such award be vacated and that this matter be remanded back to the Arbitration Panel.

Respectfully Submitted,

ANTHENELLI & OTWAY

By_____
James L. Otway
108 E. Market Street
Salisbury, MD 21801
(410) 749-3900
Attorneys for Appellant

Supreme Court, U.S.
FILED
JAN 13 1995
OFFICE OF THE CLERK

No. 94-895

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

THE AMERICAN UNION OF BAPTISTS, INC.,
EUGENE F. OSBORNE, SR.,
and
MELVIN B. GLADDING

Petitioners,

v.

THE TRUSTEES OF THE PARTICULAR PRIMITIVE BAPTIST CHURCH AT BLACK ROCK, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

REPLY TO RESPONDENTS' OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

HARRY R. HUGHES
STEVEN M. SCHNEEBAUM*
PATTON BOGGS, L.L.P.
2550 M Street, N.W.
Washington, D.C. 20037
(202)457-6300

Counsel for Petitioners
**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

Table of Contents

Introduction 1

1. There Is No Requirement That Constitutional Infirmities in Lower Court Judgments Be "Preserved" for Review by This Court 2
2. Even if "Preservation" of Arguments Is Required, Petitioners Did All That Was Necessary to Guard Their Rights 5
3. Petitioners' Constitutional Arguments Are in No Way Rebutted by Respondents' Opposition 7
4. Respondents Significantly Misstate the Record 8

Conclusion 10

Table of Authorities

Cases:

Board of Education of Prince George's County v. Prince George's County Educators' Ass'n, Inc., 522 A.2d 931 (Md. 1987) 6

Cohen v. Cowles Media Co., 501 U.S. 663 (1991) 4

Jones v. Wolf, 443 U.S. 595 (1979) 7

O-S Corporation v. Samuel A. Kroll, Inc., 348 A.2d 870 (Md. 1975) 6

Victor v. Nebraska, ___ U.S. ___, 114 S. Ct. 1239 (1994) 4

Statutes:

28 U.S.C. § 1257(a) 3

Supreme Court Rule 15.5 1

Md. Code, C & A § 5-306(a)(5)(ii) 8

Md. Code, Corps. & Ass'ns § 5-310 5

Introduction

Petitioners herein, The American Union of Baptists, Inc., Eugene F. Osborne, Sr., and Melvin B. Gladding, have petitioned this Court for a writ of certiorari to the Court of Appeals of Maryland. They have contended that, in a decision dated June 28, 1994, and reported at 644 A.2d 1063, see Petition for Certiorari ("Cert. Pet.") at 1a-16a, the highest court of the State of Maryland misconstrued the First and Fourteenth Amendments to the Constitution of the United States, and thereby deprived them of fundamental constitutional rights.

Respondents, the Trustees of the Particular Primitive Baptist Church at Black Rock, Inc., oppose the Petition. Respondents have chosen not, however, to address or to rebut Petitioners' constitutional arguments. They have not attempted to reply to Petitioners' submission that the court below acted in a way inconsistent with the teachings of this Court. Rather, Respondents rely solely on procedural issues: on the argument that the questions that Petitioners now raise were not properly preserved during review before the State courts in Maryland.

Petitioners now respectfully reply to the Brief in Opposition of Respondents ("Op. Cert."), pursuant to Rule 15.5 of the Rules of this Court. They submit that Respondents' position is devoid of support in the caselaw,[1] and that it turns on a reading of the facts that finds no comfort in the record. Petitioners raise important issues of constitutional law that deserve serious consideration; it would be a shame were that consideration denied in reliance on representations that the facts and law of this case are very different from those actually presented by the Petition.

---

[1] Respondents cite not one single precedent of this Court or any other court in their Brief in Opposition.

1. There Is No Requirement That Constitutional Infirmities in Lower Court Judgments Be "Preserved" for Review by This Court

The gravamen of Respondents' case is that Petitioners have not "preserved for review" the substantive constitutional issues discussed in their Petition for certiorari. Respondents apparently consider this argument to be so strong that they state it three times, in slightly different language. In its second and third iterations, the argument is that Petitioners have somehow "conceded" so much of the case by their conduct below (i.e., by what they did and did not challenge before the State courts), that review here by certiorari would be "inappropriate," or, alternatively, that so many issues were "waived" by Petitioners below as to make the issues presented "mere academic question[s]."

But no matter how many times it is stated, and no matter how distorted a rendition of the record of the case below is cited in its support, Respondents' argument fails as a matter of law, for one simple reason: there is no requirement that a petitioner "preserve" constitutional issues for discretionary review by this Court. That is, no matter what the nature of the challenge that Petitioners raised before the Maryland Court of Appeals to the ruling of the lower courts of the State, the issue before this Court is constitutional scrutiny of the judgment of the former. The constitutional infirmities of **that judgment** are what give rise to Petitioners' claim, and what they respectfully ask this Court to revisit and to correct. This Court does not sit as a court of appeals limited to reconsideration of the arguments presented by litigants to lower tribunals. It is a reviewer of judicial acts, and it is empowered to test those acts by the measure of the Constitution. That, not reconsideration of arguments attempted unsuccessfully below, is what Petitioners now seek.

This Court has the authority to review by writ of certiorari any decision of the highest court of a State, inter alia,

> where the validity of a statute of any State is drawn into question on the ground of its being repugnant to the Constitution . . . of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of the United States.

28 U.S.C. § 1257(a). Until the judgment whose review is sought is issued by the lower court, of course, it cannot be evident whether these prerequisites are met. The Court of Appeals of Maryland determined in the case at bar -- erroneously, in Petitioners' view, for the reasons elaborated in the Petition -- that it could not adjudicate the dispute presented to it, because of what it understood to be the strictures of the First Amendment. But the correctness of that view, which is at issue here, cannot have been a question presented for any court's determination until the view was expressed.

The requirement that Respondents seek to have the Court impose apparently would have asked Petitioners to present their argument that the Constitution permits (indeed, mandates) resolution of the dispute on the merits to the Maryland Court of Appeals itself (or, perhaps, to one of the lower courts). But there was no reason for Petitioners to do so until the last court entered its ruling that it was barred from reaching the merits. The effect of Respondents' novel argument, therefore, would be to require a petitioner for discretionary review before this Court to seek rehearing or reconsideration in the court below. This is not the law: it is inconsistent with the Rules of this Court, and with its jurisprudence.[2]

Thus, for example, in Cohen v. Cowles Media Co., 501 U.S. 663 (1991), it was held "irrelevant to this Court's jurisdiction

---

[2] Reconsideration in any event was sought by Petitioners in this case, however, and it was denied on August 19, 1994. See Cert. Pet., 1a.

whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided." 501 U.S. 663, 667 (citations omitted). That the Minnesota Supreme Court expressly based its holding on a perceived violation of the of the First Amendment ipso facto conferred jurisdiction on this Court to review that constitutional adjudication. See also Victor v. Nebraska, ___ U.S. ___, 114 S. Ct. 1239, 1249 (1994) (that the last State court considered a constitutional issue meant that this Court could review that judgment, even though the defendant himself failed to raise the issue at trial or on appeal).

In the case at bar, the decision to be reviewed is based squarely in the realm of constitutional interpretation. The reason given by the Maryland Court of Appeals for declining to reach the merits of the dispute between the parties was that "[t]he Constitution will not permit such inquiries." Cert. Pet., 16a. It does not matter, therefore, in determining this Court's authority to hear the instant case whether or not the constitutional issue was "preserved," in the sense in which a party must "preserve" an objection or an argument at trial in order to include it in her appeal. What matters is that the court below disposed of the case in reliance -- even if erroneous reliance -- on the Constitution. That is the teaching of Cohen and Victor, and it means that the authority of this Court to grant the writ and to review and reverse the judgment below is beyond dispute.

2. Even if "Preservation" of Arguments Is Required, Petitioners Did All That Was Necessary To Guard Their Rights

Respondents' contention seems to be that Petitioners failed to assert below that the Maryland courts could not constitutionally abstain from ruling on the merits of this case, a dispute over control of real property that happens to be owned by a church. From this premise, Respondents invite the inference that the constitutional issues cannot be raised here. But even a

cursory review of the procedural history of this matter shows that such a contention is simply in error.

Under Maryland law, this dispute between two factions of a church's corporate board was first submitted to arbitration. Md. Code, Corps. & Ass'ns § 5-310. The issue to be decided was the validity of the meeting of certain individuals purporting to act for the Board of Trustees of the Particular Primitive Baptist Church at Black Rock, Inc., on June 13, 1987, and of certain actions that they claim to have taken at that meeting. The arbitrators, over a dissent, concluded that the meeting and the actions were valid, and that Respondents were entitled to be considered the Board of Trustees. See Cert. Pet., 28a-44a.

Appeal was duly taken to the Circuit Court for Wicomico County, which summarily adopted the report of the majority of the arbitral panel. Cert. Pet., 25a-27a. A further appeal was addressed to the Court of Special Appeals, which decided the case not on the merits, but on the premise that the statutory dictum that arbitrators' decisions are "final" (Md. Code, C & A § 5-310(c)) means that they cannot be reviewed by the courts at all. Cert. Pet., 17a-24a. Petitioners requested and were granted a writ of certiorari by the Maryland Court of Appeals.

To their instant Brief in Opposition, Respondents attach the memorandum submitted by Petitioners to the State's highest appellate court. The purpose of this, presumably, is to demonstrate that no constitutional argument was made there. And that is absolutely correct: Petitioners argued instead for the preliminary point that the arbitrators' report was judicially reviewable (since the decision below was based expressly and exclusively on the proposition that it was not), and on the merits that the report itself was "completely irrational and palpably mistaken."[3] The latter contention was based on, among others, the

[3] These standards are taken from Maryland caselaw. An arbitral award is to be overturned if it is "completely irrational," O-S Corporation v. Samuel A. Kroll, Inc., 348 A.2d 870 (Md. 1975), or if there is "a palpable mistake of law or fact apparent on the face of the award or a mistake so gross as to work manifest

arbitrators' apparent conclusion that five people can constitute a majority of a board comprising ten members. That proposition is quite literally not rational, and it is obviously erroneous as a matter of both language and arithmetic.

It was the Court of Appeals, after finding the basis on which the Court of Special Appeals had affirmed the trial court to have been in error, that determined it necessary to resolve the matter in terms of perceived First Amendment concerns. Cert. Pet., 1a-16a. That court too held that it was precluded from conducting a judicial review of the arbitrators' report, not because of its "finality," but because to do so would "require an impermissible entangling of church and state." Cert. Pet., 12a.

The appellate court's ruling, in Petitioners' submission, is erroneous as a matter of constitutional interpretation. Further, in purporting to deny Petitioners any judicial consideration of their dispute, the judgment also deprives them of property without due process of law. This is because the State courts' "abstinence" from their proper judicial role does not leave the underlying dispute unresolved: it leaves it resolved in favor of one of the contesting parties, in this case Respondents.

If, on the other hand, the State courts' approach to the case, as reflected finally in the decision of the Court of Appeals, was correct, then, in Petitioners' argument, the statute that established the framework for review must itself be unconstitutional, because it is that statute which directs the courts to conduct their assessment according to "the custom and usage of the church." This was precisely the direction that the Court of Appeals held itself constitutionally prohibited from carrying out.

It was not incumbent upon Petitioners to raise constitutional arguments prior to the Court of Appeals' conclusion that the Constitution barred its declaring the arbitrators' plain error to be plain error. Petitioners acted properly to preserve their

---

injustice." Board of Education of Prince George's County v. Prince George's County Educators' Ass'n, Inc., 522 A.2d 931 (Md. 1987).

rights, and have properly presented these constitutional issues for review by this Court.

3. Petitioners' Constitutional Arguments Are In No Way Rebutted by Respondents' Opposition

As noted, Respondents make no effort to join issue with Petitioners on any of their constitutional claims. They do not attempt to defend the conclusion of the Maryland Court of Appeals that it could not determine whether five is a majority of ten without excessively entangling itself in a "theological thicket." Cert. Pet., 12a. They do not address the question whether more than "neutral principles" are needed to interpret the language of the Bylaws of the Board of Trustees, or the Articles of Incorporation of the church.[4]

Respondents do not try to reconcile the decision below with the teaching of this Court in numerous cases, such as Jones v. Wolf, 443 U.S. 595 (1979), that, so long as doctrinal matters are scrupulously avoided, the judicial branch may and indeed must adjudicate cases, properly presented, involving church property disputes. They do not present reasons why the purely secular, corporate-law issues presented by Petitioners to the arbitrators and then to the courts are in actuality or fundamentally ecclesiastical questions in benign and secular disguise.

Nor, of course, do Respondents deign to address the second and third of the Questions Presented: whether, if the Court of Appeals was wrong and it could constitutionally have heard the dispute but refused to do so, Petitioners were denied due process of law by their eviction from the courthouse; and whether, if the court below was right and the case really does lie outside its power of judicial review, the statute making it so is not itself constitutionally defective.

---

[4] The questions that had to be addressed are listed in Cert. Pet., 16-17. The relevant sections of the Bylaws are at Cert. Pet., 51a-52a, and of the Articles at Cert. Pet., 48a-50a.

Respondents' answer to these points is procedural only, and inadequate at that.

4. Respondents Significantly Misstate the Record

Respondents do try, however, to defend the indefensible, by proffering an explanation of how five can be a majority of ten. The problem here, however, is that the tendered explanation is based on a plain misreading of the record, and is so clearly wrong that the explanation itself becomes further support for Petitioners' contention that justice requires judicial review.

There is no doubt but that, on June 13, 1987, there were ten Trustees of the Church at Black Rock. See Cert. Pet. 30a-31a.[5] There is no doubt but that, exercising their statutory power to "[d]etermin[e] the number of members necessary to constitute a quorum," Md. Code, C & A § 5-306(a)(5)(ii), Cert. Pet., 45a, the Trustees established "a majority of its members then serving" to be a quorum for the conduct of business. Cert. Pet., 49a. And there is no doubt but that the meeting of June 13, 1987 was attended by five Trustees.

It follows as plainly as can be that the meeting did not have a majority of the membership in attendance, and therefore did not have a quorum. The actions purportedly taken at the meeting, including the "removal" of Petitioner Osborne from the Board, and the "election" of new Trustees, were therefore ultra vires and without legal validity.[6]

In their "defense," Respondents proffer two explanations: that the term of Petitioner Osborne as a Trustee had ended (and so the full membership was nine, not ten), or that "the term of

---

[5] The arbitrators' report lists 11 Trustees for the period 1983-87, but it is undisputed that Elder Wood died in July 1985. Cert. Pet., 3.

[6] The lack of a quorum is only one of at least six reasons why the measures purportedly adopted at the meeting were of no legal effect. The others are listed at Cert. Pet., 16-17, and are analyzed at Cert. Pet., 17-21. In particular, even a quorum of the Trustees had no authority to remove a member or elect a new one. See the Articles of Incorporation, Cert. Pet., 48a-52a.

another Trustee had ended due to his poor health and incompetence" (presumably, with the same result). Op. Cert., 10 n. 3. The problem with these contentions, however, is that they are inconsistent with the Articles of Incorporation and the Bylaws.[7]

The Board membership of Petitioner Osborne did **not** lapse in 1987, since, under the Articles, when any vacancy is not filled by special election (which Respondents do not claim occurred here), "the Trustees then serving shall hold over until an election and seating of Trustees is completed." Article III, Cert. Pet., 49a. Moreover, if Osborne's term expired and his position became vacant, then so did those of all of the members, including those who attended the June 13, 1987 meeting, since all ten were elected at the same time. See Cert. Pet., 30a-31a. And there is no basis at all in the record for Respondents' latter contention, that any other Trustee had been removed or had resigned by virtue of incapacity.

A majority of a Board of Trustees with ten members is six. The meeting of June 13, 1987 did not have six Trustees in attendance. And even, of course, if there were some way of resolving the matter of the "majority," Respondents would still have to justify the courts' refusal to address the other deficiencies in the meeting and actions of the Trustees, none of which requires delving into matters of faith.

This case is simpler as a matter of fact, and more complex as a matter of law, than Respondents would have this Court believe. On the record of the decisions below, it is plain that Petitioners were entitled to and were denied judicial review of a "completely irrational and palpably mistaken" report of an arbitral panel, for the sole reason that such review would allegedly involve the court in an unconstitutional entanglement with

[7] The unsupportable suggestion that Osborne's term had expired appears to have originated with the arbitrators' report, which puts forward that contention without reference to evidence, and without addressing the fact that all ten Trustees were elected at once. Cert. Pet., 43a.

religion. That conclusion was an erroneous interpretation of this Court's precedents and of constitutional law, and Petitioners' only avenue for redress is now the requested writ of certiorari to the Court of Appeals of Maryland. Respondents' Brief in Opposition provides no legally adequate defense of the disposition of this case below.

Conclusion

For all of the foregoing reasons, as well as for those stated in their Petition for Certiorari, Petitioners The American Union of Baptists, et al., respectfully urge that the writ should be granted, and the decision below reviewed and reversed.

Respectfully submitted,

Harry R. Hughes
Steven M. Schneebaum*
PATTON BOGGS, L.L.P.
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6300

Counsel for Petitioners
*Counsel of Record

Dated: January 13, 1995